Supreme Court of the United States.

OCTOBER TERM, 1904.

FILED
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No. 144.

CITY OF WORCESTER, PLAINTIFF IN ERROR,

v.

WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

In Error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

No. 145.

SAME *v.* SAME.

In Error to the said Supreme Judicial Court.

No. 146.

CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER,
PLAINTIFFS IN ERROR,

v.

SAME.

In Error to the Superior Court of the Commonwealth of Massachusetts.

No. 147.

CITY OF WORCESTER, PLAINTIFF IN ERROR,

v.

SAME.

In Error to the said Superior Court.

No. 148.

CITY OF WORCESTER AND BOARD OF ALDERMEN OF THE CITY OF WORCESTER,
PLAINTIFFS IN ERROR,

v.

SAME.

In Error to the said Superior Court.

BRIEF OF DEFENDANT IN ERROR.

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Press of Geo. H. Ellis Co., Boston.

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STATEMENT OF THE CASES.

These five cases arise on writs of error, directed by the Supreme Court of the United States in the case of the first two to the Supreme Judicial Court of the Commonwealth of Massachusetts, and in the case of the last three to the Superior Court of said Commonwealth. The first two cases were petitions for writs of mandamus originally brought in said Supreme Judicial Court of Massachusetts, sitting in the County of Worcester, and, upon a hearing before the chief justice of said Court upon the petitions and demurrers, were reserved for the determination of the full court. Of the three other cases, two were bills in equity originally brought in the Superior Court for the County of Worcester, and were heard upon the bills and demurrers thereto by a single justice, who sustained the demurrers. The City of Worcester appealed from both decrees to the Supreme Judicial Court. The fifth case was an action of contract originally brought in said Superior Court for the County of Worcester. The defendant demurred, and, upon a hearing, said court sustained the demurrer, and ordered judgment for the defendant, from which judgment the plaintiff appealed to the Supreme Judicial Court. All five cases were heard, argued, and decided together in the Supreme Judicial Court, and that Court, in a single opinion covering the five cases, affirmed the judgment of the Superior Court in the two equity suits and in the action of contract originally brought in that Court, and sustained the demurrers and dismissed the two petitions for writs of mandamus originally brought in the Supreme Judicial Court. All the cases, therefore, were decided in favor of the street railway company.

Said City of Worcester is a municipal corporation in the Commonwealth of Massachusetts, originally chartered by Acts 1848, chapter 32. This charter was revised by Acts 1866, chapter 199, and was again revised by Acts 1893, chapter 444

(approved June 9, 1893). All the orders of location set out or referred to in the five above entitled suits were made between the second and last general revisions of the charter of said city. Neither in the original charter and said general revisions of it, nor in the ninety-six special acts relating to the city and the ten special acts relating to the street railway company, passed by the legislature between February 29, 1848, the date of the approval of said original charter, and May 8, 1893, the date of the last of said orders, and between said last-mentioned date and the date of the bringing of these suits, can be found any special power conferred upon the city or any of its officers in any way making an exception in the case of said city to the general provisions of law which were from time to time, during the period between the incorporation of said city and the bringing of said five suits, in force in said Commonwealth regarding the power of boards of aldermen to authorize locations and extensions of street railways, and the capacity in which said power was to be exercised. The question, therefore, of the capacity in which the aldermen acted in authorizing the extensions of location involved in these suits, and the further question of the legal effect of their action, are to be answered without reference to any special statutes, and the necessity of considering such special statutes is eliminated from the cases.

The Worcester Consolidated Street Railway Company is a street railway corporation organized and doing business under the laws of the Commonwealth of Massachusetts, and at the several dates when these actions were commenced owned and operated in the City of Worcester and in numerous outlying cities and towns a street railway system parts of which had previously belonged to other similar corporations and had been acquired by said Worcester Consolidated Street Railway Company in the year 1901 by purchase of the franchises and properties of such other companies under the general provisions of the street railway laws of said Commonwealth. Prior to such acquisition said Company, under the same name, had

owned and operated a street railway in said City of Worcester and in certain towns near said city since the year 1887, in which year (Acts and Resolves of Mass., 1887, chap. 284) the Citizens' Street Railway Company purchased the franchise, rights, and property of the Worcester Street Railway Company, each owning and operating a street railway in said City of Worcester; and the name of the purchasing company was changed to Worcester Consolidated Street Railway Company. Several years after this purchase by the Citizens' Street Railway Company, of the property of the Worcester Street Railway Company, and after said change of name, said Worcester Consolidated Street Railway Company was authorized by the Board of Aldermen of said City of Worcester, acting under authority of section 21 of chapter 113 of the Public Statutes of said Commonwealth, to extend the location of its tracks in said city.

The several orders of said Board of Aldermen authorizing said extensions of location are set out or referred to in the pleadings in one or more of said five suits, and certain provisions of these orders form the basis of said suits. The dates of these orders and the streets in which the extensions of the defendant's railway were authorized were as follows:—

(1) May 11, 1891. "From its present tracks in Front Street and Washington Square through and over Washington Square to Shrewsbury Street, through and over Shrewsbury Street to Belmont Street, and through and over Belmont Street to a point opposite the centre of Lake Avenue, with the right to use horses or electricity as a motive power."

(2) April 10, 1893. "Beginning at a point in Trumbull Street at its intersection with the northerly line of Park Street, thence crossing Trumbull Square and continuing southerly along Green Street to Millbury Street, thence southerly along Millbury Street to the terminus of the present track at Greenwood Street."

(3) April 10, 1893. "Beginning at a point on the easterly line of Park Avenue at its intersection with Pleasant Street,

thence westerly crossing said Park Avenue and continuing westerly and northerly along said Pleasant Street to the southerly line of June Street."

(4) April 24, 1893. "Beginning at the end of the present double track in said Pleasant Street at West Street, thence westerly along said Pleasant Street to the easterly line of Park Avenue."

(5) April 24, 1893. "Beginning at the present location of said Company's tracks in Front Street, thence easterly across Washington's Square to Shrewsbury Street, thence easterly along Shrewsbury Street to Belmont Street, thence easterly along Belmont Street to Plantation Street."

(6) May 8, 1893. "Beginning at the present tracks in Salisbury Street, thence northerly along Grove Street to Park Avenue, thence northerly along Park Avenue to the end of the present track at Chadwick Square."

Each of the extended locations, authorized by said orders, was accepted by the defendant company in accordance with said section 21 of chapter 113 of the Public Statutes. There was annexed by said Board of Aldermen to said authority contained in each of said orders certain requirements therein set forth and designated "conditions," one of which requirements in every order related to paving or other work to be done in or upon the streets in which, by such order, the Company was authorized to extend its tracks. These so-called conditions vary somewhat in the different orders, but in every instance the Company was required to perform, in connection with the constructions of its tracks upon the extended locations, a great amount of original street work; and was further required, in every instance except one, to maintain in proper condition and repair at all times thereafter a far greater portion of the surface material of the streets in which such extended locations had been authorized than was required by the provisions of the general laws in force at the dates of the several orders authorizing such extensions of location. (See P. S., chap. 113, sect. 32.) In the one instance excepted above, the portion of the street surface to be maintained by the Company was the same as that required by the general laws.

The exact requirements, however, of the various conditions are unimportant in the present cases. The so-called condition, annexed to the order referred to in paragraph numbered 2 above, is typical of all the other conditions relative to maintenance and repair of streets, and illustrates the nature of the alleged obligations upon which are based all the suits before this Court. This condition was relied on in one of the two petitions for mandamus, in one of the two suits in equity, and in the third count in the action of contract, and is in the following form:—

"Second. That said Company shall lay and maintain block paving over and upon said location and streets, as follows: In Green Street from the Boston & Albany railroad tracks to Vernon Square, between the rails and tracks and outside of the tracks to the line of the curbstone over such portions of said street as are at present unpaved. In Vernon Square between the rails and tracks and outside of the tracks on the westerly side of said location to the line of the curbstone, and outside of the tracks on the easterly side of said location for the width of ten (10) feet, parallel with said tracks to Millbury Street. In Millbury Street from Vernon Square to the bridge at Quinsigamond, crossing the Blackstone River between the rails, between the tracks and outside of the tracks to the line of the curbstone on each side of said location over such portions of said street as are at present unpaved, and said Company shall have the right to use so much of the present paving as shall be included within the line of said location. In Millbury Street from said bridge at Quinsigamond to the terminus of said location, between the rails, between the tracks and eighteen inches outside thereof, and for the remaining width of said portion of Millbury Street the highway department of the City of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said Company. Said pavements shall be of such quality and laid in such manner as said committee shall direct. In case said Company shall fail to keep said pavements in proper repair to the satisfaction of said committee, the same may be repaired by said com-

mittee and the expense of such repairs shall be paid by the said Company."

The order containing this so-called condition is set out in full in the Transcript of the Record in two of the cases before this Court; namely, the petition for mandamus, No. 144, and the bill in equity, No. 146.

No question is raised in any of these cases as to whether or not the Company satisfactorily performed the work which the so-called conditions required it to do in connection with originally laying its tracks upon the extended locations, nor is any question raised as to whether the Company did or did not properly maintain the pavement and surface material of the various streets in accordance with the requirements of said conditions prior to the enactment by the Massachusetts legislature of the statute (Acts 1898, chap. 578) the constitutionality of which is assailed in these five cases.

Subsequent to the passage of said statute (Acts 1898, chap. 578) the plaintiff in error brought in the courts of Massachusetts the five suits the Record of which is now before this court. The city sought by one of the petitions for writs of mandamus (No. 144) and by one of the suits in equity (No. 146) to compel the Street Railway Company to continue to repair and maintain the surface of the streets mentioned in the paragraph above numbered (2), and by the other petition for a writ of mandamus (No. 145) and by the other suit in equity (No. 147) similar relief in relation to the streets mentioned in the paragraph above numbered 3; and these four suits, therefore, related to only two of the orders of location. The action of contract (No. 148) was brought to recover expenses incurred by the city in renewing and repairing various portions of the pavements or other surface material of certain of the streets mentioned respectively in each of the paragraphs above numbered 1, 2, 4, 5, and 6, because of the refusal of the Street Railway Company longer to maintain and repair such streets after the passage of said statute (Acts 1898, chap. 578).

These five cases can be considered together, as, notwithstanding the variation in the amount and kind of work required to be performed originally by the defendant and the amount and kind of surface material subsequently to be maintained in proper repair by the defendant, the cases present regarding each order, and the paving requirement therein contained, only the same questions, namely:—

First. In what capacity did the Board of Aldermen of the City of Worcester act in imposing the so-called "conditions" (claimed by the city to amount to contracts) contained in the orders of location: whether

(*a*) Under a delegated authority from the legislature and as its agents for the time being, or

(*b*) As the agents and representatives of the City of Worcester in its corporate capacity?

Second. Was the Board of Aldermen, at the time of granting the orders of location, authorized to impose, in form and manner as it attempted to do, the so-called "conditions" requiring the street railway to maintain and keep in repair any part of the surface material of the streets in which the Company was authorized to extend the location of its tracks?

[NOTE. This question was not answered by the Supreme Judicial Court of Massachusetts, as its determination on the effect and constitutionality of the Statute of 1898, chapter 578, rendered the decision of this question immaterial.]

Third. If said Board of Aldermen acted in imposing the so-called conditions as the representatives of said city, and if said board was authorized to impose the conditions in form and manner as it attempted to do, did it represent said city

(*a*) In its corporate capacity as a mere governmental agency, or

(*b*) In its private corporate capacity and as officers of said city dealing with rights or property belonging to said city in its proprietary capacity?

Fourth. Were the purpose and effect of Chapter 578 of the

Acts of 1898 to terminate the obligation of street railway companies to perform active duties in the maintenance and repair of the surface material of streets?

Fifth. If the purpose and effect of the Statute of 1898 (chap. 578) were to abrogate the obligations set out in the five suits begun by the City of Worcester, was it within the power of the legislature of Massachusetts to enact said statute, or did the statute violate the provisions of the Constitution of the United States prohibiting acts of the legislature

(*a*) Impairing the obligation of contracts or

(*b*) Depriving any person of his property without due process of law?

Sixth. Did the statute violate any provision of the constitution of Massachusetts?

ARGUMENT OF DEFENDANT IN ERROR.

First.

The Board of Aldermen of the City of Worcester in imposing the so-called conditions (claimed by the city to amount to contracts) contained in the orders of location acted, so far as it was intrusted with any power in relation to the location and construction of the defendant's railway, not in the capacity of officers or representatives of the City of Worcester, but as public officers under authority delegated to them by the legislature.

The City of Worcester, as a municipal corporation, had no power, whether acting by its Board of Aldermen, by its city government, or otherwise, with respect to street railway locations within its limits.

I.

Municipal corporations in the Commonwealth of Massachusetts possess only such powers and rights as are expressly granted

them by the State or such as are derived by necessary implication from the powers and rights expressly so granted.

In a comparatively early case, decided in 1840, it was held that a town could not be charged with the expense of building an embankment to divert one stream into another, for the purpose of avoiding the construction of more than one bridge in building a highway, which the town was lawfully required to build. The Court, speaking through Shaw, C. J., held that there was no implied power to build the embankment in connection with the construction of the highway, and in the course of its decision illustrated its conclusion as follows:—

> "A town might be so situated near the outlet of a lake or pond, where a road would be liable to be flooded and damaged by freshets, and where a very heavy expense would be required for the necessary bridges and embankments, but by cutting a canal and making a new outlet at the opposite side of the lake, at some distance, this expense might be saved. This would hardly be sufficient to raise a constructive power in the town, to undertake such distant canal, or to confer an authority on county commissioners to require it. It would lead to a latitude of construction, in regard to corporate powers and duties, which would be in a high degree dangerous. Such a case can seldom occur; and, when it does, and is of sufficient importance, it is better to leave it to be provided for by a special act of the legislature, which is the source and fountain of all public authority. Such an authority may be adapted to the particular case, and limited and modified, as the circumstances of each case may require."
>
> *Anthony* v. *Inhabitants of Adams*, 1 Met. 284, at p. 287. (1840.)

By a statute of the Commonwealth, cities and towns were authorized to erect and maintain lamps for lighting their streets. In response to an inquiry from the legislature the Supreme Judicial Court gave an opinion that cities and towns could constitutionally be authorized by the legislature to maintain

and operate gas or electric plants for furnishing light for themselves and for sale to their inhabitants. Notwithstanding this decision, the Court held that no authority to maintain and operate such a plant could be implied from the existing statute, authorizing a city or town to erect and maintain lamps for lighting the streets.

Spaulding v. *Peabody*, 153 Mass. 129. (1891.)
See *Opinion of Justices*, 150 Mass. 592.

In a case where a town had agreed with the plaintiff's predecessors in title to keep open a watercourse in consideration of certain grants from the plaintiff's predecessors in title, the Court dismissed the plaintiff's bill for specific performance on the ground that a power given to a town by legislative act, to keep certain streams open and free from obstructions, and to remove obstructions therefrom, conferred no power upon the town to remove dams from the stream, and that the agreement, although fully executed on the part of the plaintiff, was void and unenforceable.

Swift v. *Falmouth*, 167 Mass. 115. (1896.)

In the very early case of *Bangs* v. *Snow et al.*, reported in Volume 1 of the Massachusetts Reports, where the defendants sought to justify in an action of trespass *de bonis*, on the ground that they had duly acted as assessors of the parish in assessing upon its inhabitants, of whom the plaintiff was one, and in distraining upon the plaintiff's goods for his proportional share of the sum of $1,200, for past charges of the parish, of which it appeared that a large part was, in fact, used for securing the incorporation of the parish as a town, the defendants' counsel sought to support the legality of the tax by a statute authorizing the assessors of parishes to assess *all such rates and taxes as shall be agreed upon and granted by their parish at a meeting*, and by another statute authorizing parishes to grant money for certain purposes, *and all other necessary*

parish or precinct charges. This contention was disposed of, according to the reporter, as follows:—

> "But the Court were so clear that parishes had no powers, except those given by the statutes, and that those extended only to the settlement of ministers, building houses of public worship, and the charges arising from, and necessarily connected with, those objects, and that this doctrine had been so uniformly holden in the judicial courts, they would not permit the counsel to proceed in his argument, saying it was like arguing against a first principle, and respecting which there had never been any doubt."
>
> *Bangs* v. *Snow et al.*, 1 Mass. 180 at p. 189. (1804.)

Without an express legislative authority the Court has held that a town cannot appropriate money for defence against an invading enemy,—

Stetson v. *Kempton*, 13 Mass. 272, 279 (1816),—

nor to build a county highway,—

Parsons v. *Goshen*, 11 Pick. 396 (1831),—

nor to celebrate Cornwallis's surrender,—

Tash v. *Adams*, 10 Cush. 252 (1852),—

nor to purchase company uniforms,—

Claflin v. *Hopkinton*, 4 Gray, 502 (1855),—

nor to celebrate the Fourth of July,—

Hood v. *Lynn*, 1 Allen, 103 (1861),
Gerry v. *Stoneham*, 1 Allen, 319 (1861),
Morrison v. *Lawrence*, 98 Mass. 219, 221 (1867),—

nor to pay expenses incurred in promoting or opposing the annexation of one municipality to another,—

Minot v. *West Roxbury*, 112 Mass. 1. (1873.)
Coolidge v. *Brookline*, 114 Mass. 592. (1874.)

Further citations are unnecessary. They are full and conclusive to the point that municipal corporations in the Commonwealth of Massachusetts possess only such powers as are expressly delegated to them by the legislature or as they can be affirmatively shown to possess.

This Court has repeatedly stated that the powers of municipal corporations are such only as they can be clearly shown to possess.

"It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers that we need not stop to refer to authorities."

Minturn v. *Larue et al.*, 23 Howard, 435, at p. 436. (1859.)

"It may very well be that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract because the statute provided specially for that mode of determining them."

Detroit v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368 at p. 388. (1901.)

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative

must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court."

Pearsall v. *Great Northern Ry.*, 161 U. S. 646 at p. 664. (1895.)
Quoting *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666.

"The power, therefore, must be granted in express words, or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in the *Grand Rapid*, etc., *Power Company* v. *Grand Rapid*, etc., *Company* [33 Federal Reporter, 659], says 'that municipal corporations possess and can exercise only such powers as are granted in express words or those necessarily or fairly implied in or incident to the powers expressly conferred or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.' . . . This would make 'necessarily implied' mean inevitably implied." Lord Hardwick's explanation is "'that a necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.' If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark."

Detroit Citizens' St. Ry. Co. v. *The Detroit Railway*, 171 U. S. 48 at p. 54. (1897.)

"It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question, including rates of fare."

Detroit v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368 at p. 382. (1901.)

II.

No express or implied authority has ever been given the City of Worcester by its charter or any revision thereof, or by any special act of the legislature, to grant locations to street railway companies, nor to enter into any contract with such companies respecting locations.

This statement can be verified by an examination of the special legislation referred to, but such examination is unnecessary in the absence of a contrary claim on the part of the plaintiff in error.

III.

No authority to grant locations to street railway companies or to enter into any contracts with them respecting locations has ever been conferred upon the City of Worcester by the general statutes of the Commonwealth, nor has such authority ever been recognized by the decisions of the courts of the Commonwealth; but the whole policy of the State deducible from said statutes and decisions shows that the authority has been given to boards of aldermen and selectmen as public officers representing the whole public, and is to be exercised by them independently of any official relation to the municipality.

Evidences of the general separation of municipal acts from acts of municipal officers under authority delegated by the legislature.

This dual capacity of municipal officers is an essential feature of the governmental administration policy in Massachusetts, and was recognized and established long before the introduction of street railways in Massachusetts.

In *Dill* v. *Wareham*, 7 Metcalf, 438 (1844), Shaw, C. J., speaking for the Court, at page 447 said of a statutory authority to selectmen to grant permits for taking oysters:—

"But the court are of opinion that the selectmen, in giving permits under the authority thus conferred on them, are not

the agents of the town, subject to be directed, restrained, or controlled by its votes. They act under an authority conferred on them by statute, to be executed according to their own judgment, and do not act ministerially, according to the will of the town, expressed by its votes. It is like the authority given to selectmen, by other statutes, to lay out town ways, under which it has been held that a vote of the town, directing them to lay out a particular town way described, is irregular and void.

Kean v. *Stetson*, 5 Pick. 492. (1827.)"

Other examples of the recognition of this distinction, independently of cases directly affecting street railways, are the following:—

In a case where the question was as to the capacity in which members of a fire department, appointed and paid by the City of New Bedford, acted in the discharge of their duties, it was held as follows:—

"The members of the fire department of New Bedford, when acting in the discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service; and no action will lie against the city for their negligence or improper conduct, while acting in the discharge of their official duty."

Hafford v. *City of New Bedford*, 16 Gray, 297 at p. 302. (1858.)

In a case where the question was as to the capacity in which a surveyor of highways, elected and paid by the town, acted in repairing a highway, Bigelow, C. J., said:—

"They are, strictly speaking, public officers, clothed with certain powers and duties which are prescribed and regulated by statute. Towns cannot direct or control them in the performance of these duties. They cannot remove them from

office during the term for which they are chosen. They are not amenable to towns for the manner in which they discharge the trust reposed in them by law. Nor can towns exercise any right of selecting the servants or agents by whom they perform the work of repairing the highways. In the discharge of these general duties they are wholly independent of towns, and can in no sense be considered their servants or agents."

Walcott v. *Inhabitants of Swampscott*, 1 Allen, 101, at p. 102. (1861.)

And this decision was rendered notwithstanding that at that time, as now, cities and towns were by statute obliged to maintain and keep in repair the streets within their respective territories.

In a case where the plaintiff sought to charge the city for the acts of a police officer appointed and paid by the city, Bigelow, C. J., said:—

"Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts."

Buttrick v. *Lowell*, 1 Allen, 172 at p. 173. (1861.)

In a leading case, where the point at issue was as to the capacity in which the Board of Aldermen of the City of Boston acted in exercising their exclusive control of the construction of the common sewers in that city, the Court held:—

"The duties of the aldermen in determining what drains should be built, and where they should discharge, were of a quasi-judicial nature, involving the exercise of a large discretion, and depending upon considerations affecting the public health and general convenience. They were required to act, not as agents of the city, or in any manner under the direction of the city, but as public officers."

Child v. *City of Boston*, 4 Allen, 41, at p. 51. (1862.)

And where the question raised was as to whether the City of Boston was estopped from claiming title to land by the wrongful act of its assessors in taxing it to a person who had no title to the same, or by a sale by a collector of the City of Boston for non-payment of such tax, the Court held that such acts of such officers could not work an estoppel against the city, giving the following as the reason for their decision:—

> "If the assessors and collector were to be regarded in the light of mere private agents of the city, there might be some foundation for the demandants' position, that the city is estopped to deny the validity of their acts. But they are not to be so regarded. Though elected by the city, they are public officers, having their duties prescribed by law, for the general welfare, and are guided by the law in the exercise of these duties."
>
> *Rossire* v. *City of Boston*, 4 Allen, 57 at p. 58. (1862.)

In an even stronger case on the facts, the Supreme Court of Massachusetts has held that the city government itself of the City of Boston acts in certain respects not as agents of the city, but as public officers. In the case mentioned, the question was as to the capacity in which the city government acted in raising the grade of streets, and on that question the Court said:—

> "If, in proceedings of this character, the city government were to be regarded as the agents of the city, there could be little doubt that he would have such right. But, in laying out or raising the grade of streets, they act, not as agents of the city, but as public officers."
>
> *Griggs* v. *Foote*, 4 Allen, 195 at p. 197. (1862.)

In a case a few years later where the Court had to consider the question as to whether a town was bound by the admissions of its overseers of the poor to the extent of being precluded from showing that a certain pauper and his descendants had established a settlement in the town, it was held that such ad-

missions were not binding upon the town for the reason that overseers of the poor were not, in the conduct of their duties as such, agents of the town, although appointed and paid by the town.

City of New Bedford v. *Inhabitants of Taunton*, 9 Allen, 207, see particularly 209. (1864.)

So of a superintendent of streets appointed and paid, and whose duties were prescribed by a city under a power contained in its charter, the Court said:—

"The principle established by the authorities is, that the duty of keeping public ways in repair is one imposed upon all towns and cities alike, as a public duty from the performance of which they derive no special advantage in their corporate capacity: and that the agents selected to execute this duty in obedience to the law of the Commonwealth are to be regarded as public officers rather than as the servants or agents of the municipal corporation by which they are employed."

Barney v. *City of Lowell*, 98 Mass. 570 at p. 571. (1868.)

The constable and deputy collector of the City of Boston, in serving a warrant for the collection of taxes, has been held by the Court to be not a servant of the city, but a public officer, although appointed and paid by the city, so that the city is not liable to a person whom he illegally arrests, in an action of tort, nor is the city liable in an action of contract for the tax paid to the collector by the person illegally arrested. On this point the Court said:—

"The constable and deputy collector, in serving the warrant, did not act as the servant or agent of the city, but as a public officer of the law. If he exceeded his authority, the remedy of the plaintiff is in a suit against him; but the city is not responsible, and the plaintiff cannot maintain an action against it for damages, nor to recover back the money paid."

Dunbar v. *City of Boston*, 112 Mass. 75 at p. 75. (1873.)

So, if the assessors and collectors of a town commit assault and battery, and are guilty of false imprisonment while performing their duties in that capacity, and even though they act in so doing with such integrity and fidelity as not to make themselves liable to an action, they do not make liable the town which elects and pays them.

"The assessors and collectors, though elected by the inhabitants of the town, are not the agents of the town, but are public officers whose duties are prescribed by law."

Alger v. *Inhabitants of Easton*, 119 Mass. 77 at p. 78. (1875.)

So the selectmen of towns, acting under the authority of a statute instructing them to establish public watering-troughs in the town, act in so doing as public officers in such wise that, if in pursuance of a vote of the town they put up a trough of such a character as to frighten horses, the town is not liable for the injury so occasioned.

"These provisions make the selectmen a board of public officers charged with this duty; they are not agents of the town, but they represent the general public. . . . The towns, in their corporate capacity, have not been given the right by statute to construct drinking-troughs in the public highways, nor does it appear that they have usually exercised the right. The vote of the town instructing the selectmen in this duty, and limiting the expense, was irregular and unauthorized."

Cushing v. *Inhabitants of Bedford*, 125 Mass. 526 at p. 528. (1878.)

In a leading case decided in 1887 the Court, after referring to cases in which a municipality is liable in actions of tort for negligence because of a statutory municipal duty or liability, said:—

"Easily distinguishable from these are the cases where the city or town is exonerated from liability, on the ground that the wrongful act complained of is not its act, but the

act of persons who are deemed to be public officers, existing under independent provisions of law; officers who, though appointed and paid by the city or town, and though perhaps its agents or servants for other purposes, are yet held not to sustain this relation in respect to the particular act in question; as, for example, members of a fire department."

Tindley v. *Salem*, 137 Mass. 171 at p. 173. (1883.)

This is the leading case upon the subject, in which the Court cited and reviewed the previous decisions, and which itself has been repeatedly cited since in a long series of decisions, rendering further citations superfluous to establish the proposition that in Massachusetts the dual capacity in which many municipal officers act is ingrained and fundamental in its system of administering the government of the State.

The fact that municipal authorities in the exercise of certain of their powers act as public officers and agents of the State has been the ground of numerous decisions of this Court.

Most notable of these cases recognizing this capacity of local authorities are those where city ordinances impairing the obligation of contracts have been held to be within the constitutional provisions prohibiting any *State* from passing any law impairing the obligation of contracts, the ground of the decisions being that the local authorities, in passing the ordinances in question, were merely exercising legislative power.

These cases were thus reviewed by this Court in *New Orleans Water-works*, v. *Louisiana Sugar Co.*, 125 U. S. 18 at p. 31:—

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States.

"For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative

branch of the government, and, whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. *United States* v. *New Orleans*, 98 U. S. 381, 392; *Meriwether* v. *Garrett*, 102 U. S. 472. Accordingly, where the city council of Charleston, upon which the legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, this court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and, when the ordinances were passed under the supposed authority of the legislative act, their provisions became the law of the State. *Murray* v. *Charleston*, 96 U. S. 432, 440. See also *Home Ins. Co.* v. *City Council of Augusta*, 93 U. S. 116."

Statutes authorizing Locations of Street Railways, and Judicial Decisions as to the Capacity in which the Officers delegated to make such Locations act.

At the dates of the several grants of location involved in the cases before this Court there were only two statutory provisions authorizing municipal officers in any capacity to act in the matter of locating street railways. One of these provisions was section 7 of chapter 113 of the Public Statutes, as follows:—

"The board of aldermen of a city or the selectmen of a town, upon the petition of such directors or a majority thereof, for a location of the tracks of the railway therein, shall give notice to all parties interested, by publication in newspapers, or otherwise, as they may determine, at least fourteen days before their meeting, of the time and place at which they will consider such location, and after a hearing they shall pass an order refusing such location, or granting the same, or any portion thereof, under such restrictions as they deem the interests of the public may require; and the location thus granted shall be deemed and taken to be the true lo-

cation of the tracks of the railway, if an acceptance thereof by said directors in writing is filed with said mayor and aldermen or selectmen within thirty days after receiving notice thereof."

This section 7 related only to locating a street railway in the first instance.

The only other section applicable was section 21 of chapter 113 of the Public Statutes, authorizing extensions of street railway locations, and was as follows:—

"The board of aldermen or the selectmen may, from time to time, under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway company, whose charter has been duly accepted, and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town, without entering upon or using the tracks of another street railway company; and such extended location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof. Before acting upon the petition, at least fourteen days' notice of the hearing shall be given to all parties interested, by publication in such newspapers as the board of aldermen or selectmen may determine, or otherwise."

This was the only provision of the Public Statutes of Massachusetts in any way authorizing the location of an extension of a street railway, and is admitted by the pleadings in the cases before this Court to have been the statutory provision under which all the action of the Mayor and Aldermen of the City of Worcester, in granting the locations in question, was taken.

For this admission as to the two petitions for mandamus, No. 144 and No. 145, see reservation by Chief Justice Holmes, near bottom of p. 12 of the Transcript of Record in each case.

The first bill in equity, No. 146, related to the same location as the first petition for mandamus, No. 144, and the second

bill in equity, No. 147, related to the same location as the second petition for mandamus, No. 145.

For this admission as to the action of contract, No. 148, see, regarding the various locations declared on in the plaintiff's declaration, the specific statement that each location was made under the provisions of section 21 of chapter 113 of the Public Statutes; as to count 1, page 5 of the Transcript of Record; as to count 2, page 6 of the Transcript of Record; as to count 3, page 7 of the Transcript of Record; as to count 4, page 9 of the Transcript of Record; as to count 5, page 10 of the Transcript of Record; as to count 6, page 12 of the Transcript of Record; as to count 7, page 13 of the Transcript of Record.

Said section 21 of chapter 113 of the Public Statutes was first enacted as section 11 of chapter 29, Acts 1874, which was the first statute authorizing the organization of street railway companies without a petition to the legislature for a special charter.

Said section 7 of chapter 113 of the Public Statutes, in substantially the same form, was first enacted by section 14 of chapter 229 of the Acts of 1864, which was the first comprehensive attempt on the part of the legislature to enact general provisions of law to govern street railways, the practice up to that time having been to insert in each special charter such provisions as seemed to the legislature expedient.

The corresponding provisions in special charters, as illustrated in the charter of the Cambridge Railroad Company, the second company chartered in Massachusetts, Acts 1853, chapter 383, were as follows:—

By section 1 certain persons were incorporated

> "with power to construct, maintain, and use a railway or railways, with convenient single or double tracks, from such point or points of the city of Cambridge, upon and over the streets or highways therein, as shall be from time to time fixed and determined by vote of the mayor and aldermen of the said city of Cambridge, and assented to in writ-

ing by said corporation. . . . Provided, however, that all tracks of said railroad shall be laid at such distances from the sidewalks in said cities as the mayor and aldermen thereof, respectively, shall in their orders, fixing the routes of said railroad, determine to be for the public safety and convenience."

By section 8 it was further provided as follows:—

"The said road shall be constructed and maintained in such form and manner, and upon such grade, and with such gauge, as the mayor and aldermen of said cities and the said bridge corporation, respectively, may, in their votes, fixing and determining the routes thereof as aforesaid, prescribe and direct, and whenever, in the judgment of said railroad corporation, it shall be necessary to alter the grade of any street so occupied by it, such alteration may be made at the sole expense of said corporation, provided the same shall be assented to by the mayor and aldermen of said cities, respectively."

By Acts 1871, chapter 381, which was the first general revision of Acts 1864, chapter 229, the provisions of said section 14, Acts 1864, chapter 229, were re-enacted substantially without change.

Acts 1871, chap. 381, sect. 14.

The question of the relation of a street railway company to a municipality within which any part of its railway existed, and of the capacity in which the mayor and aldermen acted in locating such railway, was early considered by the Supreme Judicial Court of Massachusetts.

Indeed, the first case arose upon the construction of the charter of the Cambridge Railroad, above mentioned, Acts 1853, chapter 383. The City of Cambridge brought a bill in equity against the company to restrain it from increasing its fares above the amount which the mayor and aldermen had undertaken to limit when they authorized the company to extend the location of its railway in said city. Although it was found

by the Court that this increase of fare might subject the charter of the company to forfeiture if it were made in excess of the power of the company, and although the Court found that by the company's charter the City of Cambridge was empowered after ten years to purchase the franchise and property of the company, a right of which it might be deprived in case of forfeiture, the Court refused to entertain the bill upon the ground that neither the city of Cambridge in its corporate capacity, nor the mayor and aldermen of said city, as its representatives, had any standing before the Court to bring the bill. In the course of the opinion, delivered at the January term, 1865, Bigelow, C. J., discussing the capacity in which the mayor and aldermen acted in locating the defendant's railway, said:—

> "So far as they are intrusted with any power in relation to the location and construction of the road, and other matters connected with its use, these duties are specifically enumerated and defined, and they are to be performed by them, not as officers acting for or representing the city, but as a body of men on whom certain duties of a ministerial or quasi-judicial nature are by law devolved. These duties have no necessary or essential connection with those which they are called on to perform in their official capacity, as a branch of the city government. They might have been imposed as well on any other body of men, if the legislature had seen fit, although it was doubtless wise, as a matter of convenience and expediency, that they should be performed by those who, in their official connection with the city, would be more likely to discharge them without difficulty and to the advantage of the public."
>
> *Cambridge* v. *Cambridge R.R. Co. et al.*, 10 Allen, 50 at p. 57.

Immediately following the enactment of Acts 1864, chap. 229, the first general street railway statute, in Massachusetts, another case was decided by the Supreme Court of Massachusetts, in which the Court again had occasion to consider the capacity in which the mayor and aldermen of a city acted in matters relating

to street railways. This case was brought by the Union Railway Company to restrain the officers of the City of Cambridge from enforcing an order prohibiting the company from removing snow from its tracks, the effect of the order being to prevent the operation of the plaintiff's railway. The order was made by the aldermen of Cambridge, purporting to act under authority of said Acts 1864, chapter 229, section 16, which, so far as in point, was as follows:—

> "The board of aldermen of any city, or the selectmen of any town, in which a street railway is operated, may, from time to time, establish by an order such rules and regulations as to the rate of speed, mode of use of the tracks, and removal of snow and ice from the same, as in their judgment the interest and convenience of the public may require."

In the opinion of the Court, delivered in November, 1865, Mr. Justice Hoar, after observing that the "legislature have adhered with great uniformity to the policy which was adopted from the outset of making these corporations subject in a great degree to the direction and control of the board of aldermen of cities and selectmen of towns in which their franchise is to be exercised," continued:—

> "This control is given to these municipal officers, not as representing a conflicting interest, but as independent bodies, charged with the duty of protecting the rights and promoting the convenience of the whole public. *Cambridge* v. *Cambridge Railroad*, 10 Allen, 57, 58."
>
> *Union Railway* v. *Cambridge*, 11 Allen, 287. (1865.)

In a case decided by the Supreme Court in 1872, where a street railway company had brought a bill to prevent the revocation of its location under the provisions of Statute 1864, chapter 229, section 15, which authorized the board of aldermen of a city or selectmen of a town to revoke the location of any tracks within the limits of such city or town, Mr. Justice Colt, in delivering the opinion of the Court dismissing the bill, said:—

"The franchise which the plaintiffs took under their charter is by the laws of the Commonwealth thus limited and qualified. Their right to the use of the streets is not for all purposes exclusive, and must be exercised in common with the rights of other travellers and a just regard to public convenience; and this end is attempted to be secured by giving to the officers of cities and towns, as the most fit tribunal for that purpose, the powers above enumerated, to be exercised as in their judgment the weight of the public convenience in the use of the streets may require. The legislature have adhered from the first to the policy of making these corporations, in the use of the streets, subject to the control of the municipal officers of the cities and towns in which the franchise is to be used. And this control is given to these officers, as is said in *Union Railway Co.* v. *Cambridge*, 11 Allen, 287, 292, 'not as representing a conflicting interest, but as independent bodies, charged with the duty of protecting the rights and promoting the convenience of the whole public.'"

Medford & Charlestown R.R. Co. v. *Somerville*, 111 Mass. 232 at p. 235.

More recently a petition was brought against the City of Worcester, plaintiff in the present suits, for an assessment of damages caused to the petitioner's land by certain acts of the Worcester Consolidated Street Railway Company, the defendant in the suits now before this Court, performed under and in accordance with an order of location of its tracks in a certain street. The Supreme Court, in holding that the petition could not be maintained, observed:—

"In granting the location, the Board of Aldermen acted not as the agents of the city, but as public officers."

Underwood v. *Worcester*, 177 Mass. 173. (1900.)

In a case somewhat similar to that of *Underwood* v. *Worcester*, where the plaintiff sought to recover damages caused by water overflowing from a gutter which, it was alleged, the defendant town allowed to be obstructed in the construction of

a street railway, the Supreme Court, in ordering judgment for the defendant, stated:—

"Much of the argument of the plaintiff seems to proceed upon the theory that the town is bound by the acts of the selectmen, and that the act of the selectmen amounted to a granting of a franchise by the town. But it is well settled that the selectmen in granting a location do not act for the town, but as public officers exercising a quasi-judicial authority. *Vinal* v. *Dorchester*, 7 Gray, 421, 422. *Young* v. *Yarmouth*, 9 Gray, 386, 389. *Cambridge* v. *Cambridge Railroad*, 10 Allen, 50. *Union Railway* v. *Mayor and Aldermen of Cambridge*, 11 Allen, 287, 292. *Washburn* v. *Easton*, 172 Mass. 525. *Underwood* v. *Worcester*, 177 Mass. 173."

Hewett v. *Canton*, 182 Mass. 220 at p. 223. (1902.)

The next case cited, dealing with railroad corporations and the powers of selectmen with regard to certain details of railroad construction, and with the capacity in which such powers are exercised, so clearly states the general proposition, and has been so often cited by the Court in cases directly affecting street railways, that it is inserted at this point:—

"The legislature have authorized and constituted corporations, with capitals, to construct them (railroads) and regulate the use of them, and have imposed such duties and obligations as, in their opinion, the public safety requires. Towns, in their corporate capacity, can neither enlarge nor diminish the powers and privileges or the duties and responsibilities of railroad corporations. It is true that, in certain cases, town officers are invested with special powers, to direct and assent to the modes of crossing public highways by railroads; but, in exercising these powers, town officers, thus designated, do not act under the authority of towns, nor as their agents. Nor could such town officers be restrained or governed by the vote of the town, in the exercise of these statute powers."

Vinal v. *Dorchester*, 7 Gray, 421 at p. 422. (1856.)

The Attorney-general of the Commonwealth in his official capacity as legal adviser to various State officials and departments, in an opinion given to the Massachusetts Highway Commission construing their powers affecting street railways constructed upon State highways, stated the law under the provisions of the Public Statutes involved in the consideration of the present suits before this Court, as follows:—

> "The delegation of this authority to boards of aldermen in cities and to selectmen in towns did not confer any rights in respect to such grants upon cities and towns themselves. The officers so delegated act not as agents of the cities and towns, but as representatives of the Commonwealth, guarding the interests of the public. They had no right to bargain and sell street railway franchises, nor to make terms with street railway companies which should accrue to the financial benefit of the cities and towns in which the locations were given. They could not make a binding contract, either for a time limit of the franchise or for the payment of any revenue directly or indirectly to the Commonwealth or to a city or town."
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> *Attorney's-general's Report*, 1900, p. 61.

That the legislature of Massachusetts knew how to employ apt language to authorize a municipality to contract with a street railway company, when such was the will of the legislature, is sufficiently and conclusively demonstrated in two instances of special statutes, each the subject of a decision of the Massachusetts Supreme Court. These special statutes, so far as they relate to the point in issue, are as follows: —

> "That said city [of New Bedford] or town [of Fairhaven] is hereby authorized and empowered to contract with said railway corporation concerning the construction, maintenance, and operation of said railway, upon such terms as it may agree with said railway corporation, any laws now existing to the contrary notwithstanding."
>
> Statute 1872, c. 11.
> *New Bedford & Fairhaven St. Ry. Co.* v. *Acushnet St. Ry. Co.*, 143 Mass. 200 at p. 201.

The other instance related to the conditions under which the use of certain subways in the City of Boston might be authorized by the Boston Transit Commission : —

> "Said commission shall, subject to the approval of the board of railroad commissioners, fix by contract the terms and conditions and rates of compensation for the locations for said two tracks in any of said subways and tunnels, and for the use thereof by any street railway company or companies during a term of years not exceeding fifty."
>
> Statute 1894, chap. 548, sect. 35.
> *Browne* v. *Turner*, 176 Mass. 9.

From this review of the general policy of the Commonwealth as interpreted and defined by its court of last resort for the past century, it is apparent that —

(1) The powers of municipal corporations in Massachusetts are strictly construed and must be clearly proved to exist.

(2) The Massachusetts courts have uniformly distinguished between acts of a purely corporate or municipal character and acts of municipal officers who, though appointed and paid by the city, and in some respects its agents, perform a great variety of duties under a delegated authority in the performance of which they are independent of and not responsible to the municipal corporation.

(3) This principle that local authorities act in many respects as public officers was recognized and had become a fundamental part of Massachusetts policy long before the date of the first charter of the City of Worcester, and long before the introduction of street railways in Massachusetts, and was distinctly and specifically applied by the courts of the Commonwealth, and was the ground of their decision in determining the capacity in which local authorities acted in relation to street railways the first time the question was ever called to their attention.

(4) The fact that the courts had held that the local au-

thorities acted in relation to so many subjects of public interest, like highways, watering-troughs, fisheries, parks, paupers, police, fire departments, water-works, sewers, etc., in no other capacity than as public officers, and the close analogy between these public objects and that of street railways, which would be a nuisance in the highways, were it not for the duties they perform to the public, as was well pointed out by Shaw, C. J., in *Commonwealth* v. *Temple* (14 Gray, 69) in 1859, renders it clear that the strongest evidence must be adduced to prove that public officers act in relation to street railway companies in any capacity different from that in which they act in reference to such other public objects,— namely, as public officers; and no such evidence has been, or can be, presented in the cases before this Court.

(5) The Court in 1865 in *Cambridge* v. *Cambridge Railroad Co.*, 10 Allen, 50, decided that local authorities acted as public officers in relation to street railway companies, and not as representatives of the municipality. The statutes in force at that time and interpreted in that decision have never since been substantially changed in their provisions delegating power to local authorities respecting the location of street railways. On the contrary, in every instance of re-enactment of the street railway law, the same language as there interpreted has been repeated. Numerous decisions since that referred to have affirmed the doctrine of that case. The legislature must therefore be conclusively held in its enactments since said decision to have used such language with the meaning which the Court in that case put upon it, inasmuch as said enactments were passed with knowledge as to the interpretation which the final judge as to their meaning, the Supreme Judicial Court of the Commonwealth, would put upon them. The general principle that express and explicit language must be used by the legislature to abrogate the effect of judicial decision is applicable in its full force in this connection. Similarly, the continued use of this language after said first

decision shows that the legislature accepted that decision as the correct interpretation of the legislative intention in its original use.

The conclusion, therefore, which must necessarily follow on this branch of the argument in these cases is as follows: —

The locations in question having been granted by persons who, though municipal officers, acted in granting the locations as public officers in no way representing the City of Worcester, said city cannot have become a party to a contract between it and the Street Railway Company, the defendant in error; nor can it have imposed on the Street Railway Company any obligation in the nature of a property right of the city.

SECOND.

The requirement relative to paving as contained and set forth in the grants of the extensions of locations for the Company's railway was never valid under the law existing at the time said grants were made, nor enforceable against the Company.

I.

It is the duty of cities and towns to maintain highways in repair when other provision is not made therefor.

The general provision of law in force when these locations were granted and when these suits were brought, with reference to the maintenance and repair of highways, townways, streets, causeways, and bridges, is contained in Public Statutes, chapter 52, section 1, which is as follows: —

"SECTION 1. Highways, townways, streets, causeways, and bridges shall be kept in repair at the expense of the town, city, or place in which they are situated, *when other provision is not made therefor*, so that the same may be

reasonably safe and convenient for travellers, with their horses, teams, and carriages, at all seasons of the year."

Such has been the law of the Commonwealth for many years, this section being but a re-enactment of previous statutes in substantially the same language running back to a time long prior to the first charter granted for the incorporation of a street railway company.

R. S., 1836, chap. 25, sect. 1;
G. S., 1860, chap. 44, sect. 1;
Acts of 1877, chap. 234, sect. 1; and
P. S., 1882, chap. 52, sect. 1 (already cited).

The first street railway charter granted in Massachusetts was chapter 353, Acts of 1853, entitled "An Act to incorporate the Metropolitan Railroad Company."

Unless, therefore, some other provision of law exists relative to the repair of the streets, in the City of Worcester referred to in these actions, it is the duty of that city to maintain said streets, and the words in section 1 of chapter 52 of the Public Statutes, "When other provision is not made therefor," refer to other provision made by the legislature itself; and the burden imposed by that statute upon the City of Worcester cannot be shifted to other shoulders, except by the legislature itself or under its authority.

II.

There was no other provision of law requiring this defendant to maintain the entire width of a street, or to pave any portion of a street.

The general street railway law, Public Statutes, chapter 113, in force at the time the grants involved in these cases were made, did not impose upon street railway companies the duty of *paving* the streets, either between the rails or outside of

the tracks, but merely required a company to *keep in repair* the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks, the exact language of the statute being as follows: —

> "SECT. 32. Every street railway company shall keep in repair, to the satisfaction of the superintendent of streets, street commissioner, road commissioners, or surveyors of highways, the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks, and, if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and shall be liable for any loss or injury that any person may sustain by reason of the carelessness, neglect, or misconduct of its agents and servants in the construction, management, and use of its tracks."
>
> P. S., chap. 113, sect. 32.

The section quoted above was the only statutory provision imposing upon street railway companies any obligation relative to the repair of streets, and the specific designation of the portions of the streets which were to be maintained clearly implies that a company, whose rights and liabilities are fixed by the legislature, owes no duty in respect to the repair of streets beyond that imposed by the legislature.

Commonwealth v. *Smith*, 10 Allen, 448, pp. 456–458.

The requirement imposed in the cases at bar is clearly far beyond the limits of this statute, and, therefore, not binding upon a company under this section; nor at all, unless some other statute warranting the imposition by the aldermen of the requirement in question can be pointed out.

III.

No authority to impose such requirements at the time these grants were made existed in the Board of Aldermen.

If such authority did exist, it must have been created by statute. There were but two provisions of statute law in force, at the dates when the several grants of location involved in these cases were made, delegating to boards of aldermen authority to grant locations to street railways.

1. Such boards were authorized to grant or refuse locations to a proposed street railway company "under such restrictions as they deem the interests of the public may require."

P. S., chap. 113, sect. 7.
See copy of this section, *ante*, p. 22.

2. Exactly the same form of language is employed in the statute relative to the granting of locations for extensions of the company's railway.

P. S., chap. 113, sect. 21.
See copy of this section, *ante*, p. 23.

The latter section is the one under which it is admitted that the locations now before the court were granted, as has been shown above by specific references to the pleadings as set forth in the transcripts of Record.

Both statutory provisions limit the nature of the obligations which the aldermen may impose by the word "restrictions."

The obligation in fact sought to be imposed in the locations in question was clearly far in excess of what the statute itself (P. S., chap. 113, sect. 32) imposed, and was, therefore, not binding upon the Company under that section; and was not binding at all unless the authority to impose restrictions under section 21 of chapter 113 warranted the imposition by the aldermen of the requirement in question.

The word "restrictions," it is submitted, was intended to signify such limitations upon what otherwise would have been an unrestricted grant as the aldermen or selectmen might deem to be for the interests of the public. It was not intended to authorize the imposition of obligations for the pecuniary benefit of cities and towns in which a street railway might be located, but only such restrictions or limitations upon the construction and use of the railway itself as in the judgment of selectmen or aldermen would best promote the interest of the whole public; that is, the public of the whole Commonwealth, every member of which is entitled to the same free and beneficial use of the highway as the citizens of the particular cities and towns in which the highway may lie, and at whose expense it must be maintained.

Contemporaneous Construction of the Word "Restrictions" by Public Officers and Boards charged with enforcing the Laws.

Certainly, the view above stated of the significance and scope of the word "restrictions" is that held by those officers of the Commonwealth whose official duties bring them most in contact with matters affecting street railways, and whose opinions, therefore, are entitled to weight as indicating the probable general opinion, in the absence of anything showing the contrary. This exact question has been discussed in a recent opinion of the Attorney-general of the Commonwealth, in the course of which he says: —

> "A comparison of the old with the new railroad law may serve to illustrate this distinction. Under the old law (P. S., chap. 113, sect. 7) the municipal boards were authorized to grant or refuse locations 'under such restrictions as they deem the interests of the public may require.' Similar language governs their action in respect to extensions of the original location. The present law (S. 1898, chap. 578, sect. 13), on the other hand, expressly authorizes the municipal boards to 'impose such other terms, condi-

tions, and obligations in addition to those applying to all street railways under the general provisions of law as the public interest may in their judgment require.' The distinction between the two is material. The word 'restrictions,' as used in the former law, was obviously intended to signify such limitations upon what otherwise would be an unrestricted grant as they might deem to be for the interest of the public. For example, provisions as to the kind of rails to be used, the time of completion of the work, the rates of fare to be charged, the number of cars to be run, and the portions of the streets in which tracks should be laid would be 'restrictions' for the benefit of the public, and which municipal boards under the old law would be authorized to impose."

Attorney-general's Report, 1900, p. 61. Opinion given to the Massachusetts Highway Commission, May 25, 1900.

The Board of Railroad Commissioners had occasion to consider the same question in 1887, on the petition of the West End Street Railway Company for an increase of stock in which the Company sought to capitalize contributions, promised at the time certain locations were granted, towards the expense of widening and constructing the Beacon Street boulevard and the bridge over the Boston & Albany tracks in said Beacon Street. In the course of the opinion of the Board upon this petition the Board expressed the following views: —

"By section 7 of said chapter [P. S., chap. 113] it is provided that the board of aldermen, or the selectmen of a town, may grant 'locations under such restrictions as they deem the interests of the public may require.'

"The power to impose restrictions necessarily implies power on the part of the railway company to incur such expenditures as may be necessary or proper in order to comply with the restrictions, and the question arises whether the restrictions which were imposed in the case of this railway cover any portion of the expenditures under consideration. Neither in the grant of the location in the city of Boston, nor in that in the town of Brookline, was there

any restriction or provision requiring the railway company to contribute, or cause to be contributed, any land for the widening of the street, or any sum of money to pay for the construction of the roadway, nor in either case was the grant of location declared to be dependent upon the widening of the street. Moreover, *if such requirement or proviso had been expressed, it could not properly have been considered a restriction within the meaning of the statute.*

"It may be claimed that these agreements entered into by Mr. Whitney were the considerations for the respective grants of location. . . . But, if these agreements are regarded as the considerations for the grants of location, the Board is equally at a loss to find in the statutes any authority for such expenditures. In some States railway locations are sold in accordance with special provisions of law therefor. In this state, not only is there no direct statutory provision authorizing a sale of a location, but the authority given to boards of aldermen and to selectmen to grant locations subject to certain 'restrictions' indicates no intent on the part of the legislature to authorize sales. If the legislature had intended to give such authority, it would not have used simply the word 'restrictions.' Moreover, the Board believes that no sale of a location has ever been made in this State. Certainly no sale has been made with the knowledge and approval of the Board."

Nineteenth Annual Report of Board of Railroad Commissioners, January, 1888, p. 166, at pp. 173–174.

In a still earlier case referred to at page 19 of the Report last cited, the Railroad Commissioners held that an attempted condition in a grant of location of the Middlesex Railroad Company, that the company should not charge more than three cents for fares in certain districts, was not binding as a "restriction." Referring to the condition, the Board said: —

"The general opinion of the legal profession is that a municipal board has no right to annex such a condition to the grant of a location; and in this opinion this Board concurs."

Thirteenth Annual Report of Board of Railroad Commissioners, January, 1882, p. 122 at p. 124.

In another instance the Board of Railroad Commissioners, discussing the general street railway policy of the Commonwealth in a more recent annual report to the legislature, said: —

"It has been more or less seriously proposed to make the ordinary use of the surface of the street for railway purposes a source of revenue or relief to the municipal treasury, either by sale of the railway location or by an excise on cars, or a tax on earnings, or by requiring the railway company to pave or otherwise maintain the surface of the entire roadway. There is no reason why the railway company should not pay a tax on its corporate franchise and property such as other similar corporations pay. It is also proper that it construct at its own cost the tramway specially adapted to its use, and *keep the portions of the roadway adjacent thereto in safe condition for other travel, as is now required by statute.* These charges are a part of the cost of transportation which the passenger must expect to pay. Beyond this, it is not easy to see why one who carries passengers for hire in a car should be subjected to a tax for the use of the street, any more than one who carries passengers for hire in an omnibus, or who carries merchandise for hire on a dray. The radical objection to the proposed impost is not, however, that it is a burden on the railway company, but that it is a tax on the traveller. A tax on the carrier is a tax on the passenger. Whatever fare the railway passenger might otherwise have to pay, he must pay in addition to that fare his proportion of the tax; and the possibility of the reduction of his fare is to that extent postponed. Nothing has hitherto been more free than the use of the highway, for all persons, and for all purposes of travel or transportation. There is no good reason why the person who travels in a street car should pay, directly or indirectly, for the privilege of travelling on the highway, any more than the person who travels in a public coach or in his private carriage."

Twenty-seventh Annual Report of Railroad Commissioners, January, 1896, pp. 111, 112.

That the views of the Attorney-general and of the Board of Railroad Commissioners are entitled to consideration, see

Tyler v. *Pomeroy*, 8 Allen, 480 at p. 494, citing the opinion of Attorney-general Legaré, 3 Opinions Attorneys-general, 691.

Farnham v. *Haverhill*, etc., St. Ry. Co., 178 Mass. 300, citing the opinion of the Railroad Commissioners, p. 303.

As to value of contemporaneous construction,

Packard v. *Richardson*, 17 Mass. 122 at p. 144.

In a recent case before the Supreme Court of Massachusetts an illustration of what is a valid requirement under the power of the municipal authorities to impose restrictions is furnished, where the validity of a requirement that a street railway company shall water the street over a portion of the way, is upheld as a restriction upon the manner of running cars in such a way as not to raise a dust.

Newcomb v. *Norfolk Western St. Ry. Co.*, 179 Mass. 449.

Legislative Construction of the Word "Restrictions."

That the legislature never contemplated that the power to impose restrictions under section 21 of chapter 113 of the Public Statutes conferred upon the board of aldermen any power *to exact compensation* from a company receiving the location is conclusively shown by the different and very explicit language used by the legislature in the only instances in which it has authorized such an exaction.

In 1900 the legislature delegated to the Board of Metropolitan Park Commissioners the power to grant street railway locations in the metropolitan roads, boulevards, parks, and

reservations. In section 2 of the Act, describing the method of making such grants, the legislature followed closely the language of sections 7 and 21 of chapter 113 of the Public Statutes, with this marked difference, that in place of the clause "under such restrictions as they deem the interests of the public may require" the legislature substituted the phrase "upon such terms, conditions, and obligations, *and for such compensation*, as the public interest and a due regard for the rights of the Commonwealth may require."

Acts 1900, chap. 413, sect. 2.

See also language used in Acts 1894, chap. 548, sect. 35.

The policy of the legislature as shown by its repeated legislation on the subject of repairs of streets by street railway companies indicates that it never intended to delegate to aldermen and selectmen authority to impose the requirements in question in the cases at bar.

The nature and extent of the duty of street railway companies to repair or maintain any portion of the highways in which their railways may be constructed has always been defined and regulated by the legislature itself through legislative enactments.

In the early history of the development of this means of transportation each company was chartered by a special act of the legislature, the location of the railway being in some cases fixed by the charter, but more generally left to be fixed by the aldermen of cities and the selectmen of towns. In nearly, if not quite, every case, the charter contained a provision prescribing the liability of the company with regard to repair of streets. The earliest provision was contained in the charter of the Metropolitan Railroad Company, Acts of 1853, chapter 353, section 3, and is as follows: —

"SECT. 3. Said corporation shall maintain and keep in repair such portion of the streets respectively as shall be

occupied by their tracks, and shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants in the management, construction, or use of said tracks or roads, . . . and said corporation shall not encumber any portion of the streets not occupied by the said road or tracks."

Substantially similar in language and effect is the provision on this subject in most of the other special charters.

The increase in the number and importance of such companies led to the enactment of a general law for their regulation in 1864, when an act entitled "An act concerning street railway corporations," being chapter 229 of the Acts of 1864, was passed. Section 14 of this Act embodied for the first time the provision later contained in section 7 of chapter 113 of the Public Statutes, authorizing aldermen and selectmen to grant locations "under such restrictions as they deem the interests of the public may require." The provision relative to repair of streets in this act was as follows: —

"SECT. 18. Every street railway corporation, its lessee or assigns, shall maintain and keep in repair such portions of the streets, roads, and bridges, respectively, as are occupied by its tracks, and eighteen inches on each side thereof, to the satisfaction of the superintendent of streets, the street commissioner, or the surveyors of highways, and shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants, in the construction, management, and use of its tracks; and in case any recovery is had against any city or town, steam railroad, turnpike, or bridge corporation, respectively, by reason of any defect or want of repair caused or permitted by the street railway corporation of that part of any street, highway, or bridge, occupied by its tracks, and eighteen inches on each side thereof, said street railway corporation, its lessees or assigns, shall be liable to said city or town, steam railway, turnpike, or bridge corporation, respectively, for any sums recovered against either of them, together with all costs

and reasonable expenditures incurred by them, or either of them, in the defence of any suit or suits in which recovery is had by reason of such defect or want of repair, provided the corporation, its lessees or assigns, had reasonable notice of such suit or suits, and an opportunity to assume the defence thereof."

As prior to the enactment of this general law every street railway had been located under the provisions of a special charter, some of which required the acceptance of the special act by the city or town before it became operative, and contained other special provisions, as a right in the municipality to purchase the railway, a limitation of the life of the charter, etc., the legislature saw fit to add to the general law the following two sections, apparently for the purpose of protecting the cities and towns in the enjoyment of any special privileges which they had exacted from the companies, and may have been justified in so exacting by the provisions contained in the special charters: —

"SECT. 44. Street railway corporations now existing shall continue to exercise and enjoy their powers and privileges, according to their respective charters and to the laws in force; and shall continue subject to all the liabilities to which they are now subject, except so far as said powers, privileges, and liabilities are modified or controlled by the provisions of this statute.

"SECT. 45. All acts and parts of acts inconsistent herewith are hereby repealed. But nothing in this act contained shall operate to annul or impair in any wise any terms or conditions upon which any charter has been accepted, or location or other privilege granted by any city or town, and which have been assented to by such corporation."

Acts of 1864, chap. 229.

Two years later the legislature again took up the question of the repair of streets by the street railway companies, and in chapter 286 of the Acts of the year 1866 repealed section

18, above quoted, of chapter 229 of the Acts of the year 1864, and substituted the following provisions: —

"SECTION 1. Every street railway corporation, its lessees or assigns, shall maintain and keep in repair such portions of the streets, roads, and bridges as are occupied by its tracks, and three feet on each side thereof, not including any portion of any sidewalk, to the satisfaction of the superintendent of streets, the street commissioner or the surveyors of highways, and shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants, in the construction, management, and use of its tracks, and in case any recovery is had against any city or town, steam railroad, turnpike or bridge corporation, respectively, by reason of any defect or want of repair caused or permitted by the street railway corporation of that part of any street, highway, or bridge occupied by its tracks, and three feet on each side thereof, exclusive of sidewalks, said street railway corporation, its lessees or assigns, shall be liable to said city or town, steam railway, turnpike or bridge corporation, respectively, for any sums recovered against either of them, together with all costs and reasonable expenditures incurred by them, or either of them, in the defence of any suit or suits in which recovery is had by reason of such defect or want of repair; provided the corporation, its lessees or assigns, had reasonable notice of such suit or suits, and an opportunity to assume the defence thereof.

"SECT. 2. The liability created by this act shall be held to be in lieu of, and a substitute for, all liability now existing in regard to paving by any horse railroad company under any location or contract with any city or town; provided that this act shall not take effect in any city or town where any liability to pave is imposed by any location given, until it has been accepted by such city or town.".

Acts 1866, chap. 286.

The act further provided, however, in specifically repealing said section 18 of chapter 229 of the Acts of 1864, that "such

repeal shall not impair or affect any rights or obligations heretofore accrued or incurred."

This act clearly indicated the legislative intention that the rights and liabilities created by the Act of 1864, relative to paving, should continue. It also continued, in section 2, the reservation contained in sections 44 and 45 of chapter 229, Acts of 1864, for the benefit of any city or town not choosing to accept the provisions of the Acts of 1866, chapter 286.

Five years later, in 1871, the legislature again enacted a general street railway law, printed as chapter 381 of the Acts of the year 1871.

Section 14 of this Act contained substantially the same provision as section 14 of chapter 229 of the Acts of 1864, relative to the location by aldermen and selectmen of the railway "under such restrictions as they deem the interests of the public may require."

Section 21 of this Act contained the provision relative to the repair of streets, the exact language being as follows: —

> "SECT. 21. Every corporation, its lessees or assigns, shall keep in repair such portions of any paved streets, roads, and bridges, as are occupied by its tracks; and, when such tracks occupy streets or roads that are not paved, it shall, in addition to the portion occupied by its tracks, keep in repair eighteen inches on each side thereof, to the satisfaction of the superintendent of streets, the street commissioner, or the surveyors of highways, and shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants, in the construction, management, and use of its tracks."
>
> Acts 1871, chap. 381.

In this section just quoted appeared for the first time the limitation of the portion of the street to be kept in repair by the street railway company, as it has ever since been in force until the enactment of chapter 578 of the Acts of the year

1898; to wit, the space occupied by the tracks, and, if the tracks are in unpaved streets, eighteen inches on each side thereof. The legislature at this time evidently determined that it was no longer wise to attempt to continue in force any special provisions contained in charters or grants of locations theretofore made, for sections 58 and 60 specifically repealed the general law of 1864, and, by repealing acts inconsistent with the Act of 1871, repealed also chapter 286, Acts of 1866. The two sections referred to are as follows: —

"SECT. 58. All corporations shall continue to exercise and enjoy their powers and privileges, according to their respective charters and to the laws in force; and shall continue subject to all the *liabilities* to which they are now subject, *except so far as said* powers, privileges, and *liabilities are modified and controlled* by the provisions of this statute."

"SECT. 60. Chapter two hundred and twenty-nine of the acts of the year eighteen hundred and sixty-four, and all acts and parts of acts inconsistent with the provisions of this act, are hereby repealed."

Acts of 1871, chap. 381.

In 1874 the incorporation of street railway companies without the necessity of an application to the legislature for a special act was first authorized.

Acts of 1874, chap. 29.

There being already a general law (viz., Acts 1871, chap. 381) in force for the regulation of such companies, when established, this act contained comparatively few sections in part designed to facilitate the incorporation of companies thereunder, and in part to cover certain matters not included in the General Act of 1871. Section 6, for example, provided for the location of the railway by aldermen or selectmen *before* the organization of the company could be completed, but adopted the phrase found in the general law,

relative to locating railways of companies organized under special charter; viz., "under such restrictions as they deem the interests of the public may require."

Section 11 of this Act contained substantially the provision later embodied in section 21 of chapter 113 of the Public Statutes, relative to extensions of locations of street railways, as follows: —

> "SECT. 11. The board of aldermen of any city and the selectmen of any town may, from time to time, upon petition, authorize and empower any street railway corporation, its lessees and assigns, whose charter has been duly accepted, and whose tracks have been located and constructed, to extend the location of its tracks within the territorial limits of such city or town, whenever it can be done without entering upon or using the tracks of any other street railway corporation, under such restrictions as they deem the interests of the public may require. And the location thus authorized shall be deemed and taken to be the true location of the tracks of the corporation, if its acceptance thereof, in writing, is filed in the office of the clerk of such city or town within thirty days after receiving notice thereof. Before acting upon the petition, notice of the time and place of hearing shall be given to all parties interested, by publication, at least fourteen days prior thereto, in such newspapers or otherwise as the board of aldermen or selectmen may determine."
>
> Acts of 1874, chap. 29, sect. 11.

The act contained no provision regarding the repair of streets, as apparently the legislature felt that that was amply covered by the General Act of 1871, chapter 381, section 21.

In 1881 an important change in the law was made by chapter 121 of the Acts of 1881, which provided as follows: —

> "SECTION 1. Section twenty-one of chapter three hundred and eighty-one of the acts of the year one thousand eight hundred and seventy-one is hereby amended by inserting therein, after the word 'repair,' in the second line

thereof, the words 'the paving, upper planking or other surface material of,' so that said section as amended shall read as follows: Every corporation, its lessees or assigns, shall keep in repair the paving, upper planking or other surface material of such portions of any paved streets, roads and bridges as are occupied by its tracks; and when such tracks occupy streets or roads that are not paved it shall, in addition to the portion occupied by its tracks, keep in repair eighteen inches on each side thereof to the satisfaction of the superintendent of streets, the street commissioner or the surveyors of highways, and shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect or misconduct of its agents and servants in the construction, management and use of its tracks."

Acts of 1881, chap. 121.

For the exact effect of this act in still further limiting and restricting the liability of street railway companies, with reference to maintenance and repair of highways, see the case, recently decided in the Supreme Court of Massachusetts, of

Leary v. *Boston Elevated Railway Company*, 180 Mass. 203.

To summarize the general legislation on this subject, it appears that the legislature in the first General Act of 1864 prescribed that these companies should keep in repair a certain longitudinal portion of the street occupied by the tracks, and a space eighteen inches wide on each side thereof, irrespective of whether the street was or was not paved, but provided that the act should not annul or impair different requirements upon which any locations or other privileges had been granted in any city or town, and which had been assented to by a corporation.

Two years later the portion of the street to be kept in repair by companies was extended to include a strip three feet wide on each side of the tracks, and irrespective of whether the street was or was not a paved street. This act also con-

tained provisions for not invalidating different requirements prior to 1864.

In 1871 all exceptions were brushed aside, and the legislature prescribed that the portion of the street to be kept in repair should be the same as the portion described in almost identical language in the Public Statutes; while in 1881 came the final provision not changing the portion of the street to be kept in repair, but limiting the nature of the repair work to the surface material only of streets, roads, and bridges.

The codification made in 1882 of the general laws in the Public Statutes, chapter 113, taking the place, as it did, of all prior statutes, made no exceptions, and continued in force no exceptions or reservations contained in prior statutes, general or special, on this subject, even though such prior statute had not already been repealed before the enactment of the Public Statutes.

All these statutes are mandatory in form, and while in force were respectively binding upon all the street railway companies in the Commonwealth. An examination of these statutes clearly shows that the legislature has considered and acted upon nearly every possible phase of paving requirements to be imposed upon street railways, and has done so with the manifest intention of being itself the final and exclusive arbiter in the matter.

In view of the large number and frequency of the express enactments of the legislature itself, defining, regulating, and changing the duty of street railway companies with regard to maintaining any portions of streets in repair, and of the minute detail with which the legislature has treated the subject, can it be seriously contended that the legislature has ever parted with any of its jurisdiction, or ever intended to delegate to aldermen and selectmen any authority, over the subject of the duty of street railways with regard to the maintenance and repair of streets?

The above review of the acts of the legislature makes it

clear that the legislature has itself dealt specifically and exhaustively with the subject of the duties of street railway companies relative to the repair of streets.

The matter of requiring street railway companies to make repairs in the streets must, therefore, be held to have been removed from the jurisdiction of local boards on the principle, which must be clear, that the restrictions which might be imposed by local authorities in granting a location should not relate to a subject-matter regarding which special provision is made by the legislature itself.

This principle, that the conditions which may be imposed by local authorities in granting a location do not include those for which special provision is made by statute, has been clearly recognized in a recent case decided by the Supreme Judicial Court of Massachusetts since the present suits were originally entered. In that case the selectmen of certain towns in granting locations for a street railway prescribed conditions as to the fares which might be charged for the transportation of passengers within the limits of the respective towns, purporting to act, in imposing said conditions, under authority of the general street railway law then in force, Statute 1898, chapter 578, section 13 thereof, which provided that local authorities in granting a location to a street railway company might prescribe the manner in which the "tracks shall be laid and the kind of rails, poles, wires and other appliances which shall be used, and they may also impose such other terms, conditions and obligations, in addition to those applying to all street railway companies under the general provisions of law, as the public interest may, in their judgment, require."

Although, as will be seen, the local authorities were authorized by this statute to impose terms, conditions, and obligations on street railway companies, and not merely "restrictions," the Court held that said conditions as to fares were invalid, for the reason that, inasmuch as the statute provided that the directors of a street railway company might "establish the

rates of fare of all passengers and property conveyed or transported in its cars, subject however to the limitations named in its charter or hereinafter set forth," and provided further for a revision and regulation of the fares by the Railroad Commissioners, the legislature itself had made special provisions relative to rates of fare, and therefore the subject-matter of rates of fare was removed from the jurisdiction of the local authorities.

Keefe v. *The Lexington & Boston Street Ry. Co.*, 185 Mass. 183.

Both from the nature of the capacity in which the board of aldermen acts in locating a street railway, considered in the earlier part of this brief, as well as from the express language of the statute itself under authority of which they so act, they are confined in imposing restrictions to the imposition of such restrictions as they deem the interests of the public may require, and the interests of the public so referred to means only the interests of the whole public in regard to the location, construction, operation, and use of the railway, and it does not mean the interests solely of the people of the City of Worcester in their individual capacity, and still less the interests of the city treasury of Worcester, or the interest of the tax-payers of that city by relieving them of their share of the burden imposed by section 1 of chapter 52 of the Public Statutes.

If under the guise of a restriction the aldermen could legally require a street railway company to pave, and thereafter maintain the pavement, over the whole width of the street, notwithstanding the fact that the legislature itself had prescribed the exact portion of the street, the surface material of which the company should maintain, and had thereby created and imposed an equal and proportionate burden upon all the street railway companies of the State, and if the aldermen could similarly exact from the street railway company a money

payment to defray the cost to the city of its laying a macadam pavement entirely outside of the portion of the street prescribed by the legislature, what possible objection could be urged against the imposition of any pecuniary obligation or tax upon such companies under the guise of restrictions?

The work performed, and the payment made, by the Worcester Company in the cases at bar were for the benefit of the City of Worcester only because that work and payment relieved that city from the necessity of itself performing and paying for the work; that is, they released so much of its available funds from the purpose to which otherwise they must have been devoted, and enabled the city with those funds to meet other objects which would otherwise have required either a larger tax levy or a delay in the execution of those other objects. The amount so originally derived from a street railway company could have been accurately established; and precisely the same result would, therefore, have followed if the restrictions had been in the form of an obligation to pay so many thousand dollars upon the acceptance of the grant of location, and in the form of a further obligation for the payment of an annual sum of money estimated to be equivalent to the cost of the maintenance of the streets. Or, again, the same result would have followed, had the restriction imposed an obligation to build and maintain in repair a city hall, a school-house, or any other public building which by law the city might be required to provide and maintain.

Such exactions, under whatever name they are imposed, are in fact a tax levied upon the whole travelling public for the benefit of a particular city or town. Inasmuch as a city could not directly tax the inhabitants of another town, it is a violent assumption to claim that they can do so under a power to impose "restrictions" in the interests of the public,

Whether the power to exact money payments from street railway companies, whose only source of income is derived from the public riding in the cars, is a wise or unwise policy,

is beside the question in the cases at bar. The contention of the defendant here is that such has not been the policy of Massachusetts, and that no reasonable interpretation of language can extort from the words "under such restrictions as they deem the interests of the public may require" any justification for the inauguration of such a policy by boards of aldermen acting under authority of those words. Both the Board of Aldermen and the Street Railway Company derived their powers from, and are subject to the control of, the legislature, and, as regards the requirement sought to be enforced in the present actions, both the aldermen and the company respectively derive their power and liabilities from chapter 113 of the Public Statutes.

Chapter 113 of the Public Statutes is one enactment, and all its sections are to be so interpreted as to give reasonable effect to each, if possible.

It is a familiar rule in the construction of statutes that the whole of the statute is to be considered.

Holbrook v. *Holbrook*, 1 Pick. 250.
Opinion of the Justices, 22 Pick. 571.
Commonwealth v. *McCaughey*, 9 Gray, 296.

If under section 21 of chapter 113 of the Public Statutes the aldermen were authorized to impose an obligation that a street railway company should pave and keep in repair the entire width of a street on which its railway is located, section 32 of the same chapter can be given no force or effect as imposing an obligation of the same kind upon the company, or at most can constitute only a minimum limitation upon the authority of the aldermen. Will it be seriously contended that by section 32 the legislature merely meant to say that the aldermen *shall* require a company to keep in repair *at least* so much of the surface material of the street as is in said section prescribed, but, on the other hand, *may* require the company to keep in repair as much more of the street as the

aldermen see fit? Would such an interpretation as this be in harmony with the spirit of the principle "that such a sense is to be made upon the *whole* statute that no clause, sentence, or word shall prove superfluous, void, or insignificant if by any other construction they may all be made useful and pertinent"?

Opinion of the Justices, 22 Pick. 571 at p. 573.
Commonwealth v. *McCaughey*, 9 Gray, 296.

If the power to impose restrictions contained in section 21 authorizes the imposition of duties such as that claimed in the cases at bar, it becomes an act, to be construed by the rule that every charge upon the subject must be created by clear, unambiguous words, and is not to be extended by a doubtful interpretation.

Sewall v. *Jones*, 9 Pick. 412–414.
Green v. *Holway*, 101 Mass. 245–248.

Full effect can be given to the language of section 32 of chapter 113 without in any way destroying the force or effect of the language in section 21, authorizing the aldermen to impose "such restrictions as they deem the interests of the public may require," as was pointed out in the opinion of the Attorney-general already cited. Such restrictions enable the aldermen to prescribe where in the street the railway shall be laid, the number of tracks, the location of turnouts, the method of construction, including the kind of rails, kind and number of sleepers, limitations upon the number of cars and rate of speed to be run, and many other details, the wise determination of which is most important to the interests of the whole public, in the use both of the railway itself and of the highway in which it is located. This interpretation gives full effect to both sections of the statute, and is, moreover, consistent with the principle that powers delegated to subordinate local authorities are strictly construed, and any

reasonable doubts as to the existence of a particular power resolved against the same. In addition to the Massachusetts and United States cases already cited, see: —

Endlich on the Interpretation of Statutes, sect. 352.
Vinal v. *Dorchester*, 7 Gray, 421 at p. 422.
Paine v. *Spatley*, 5 Kan. 525.

If the defendant is right in claiming that the requirement which the Board of Aldermen sought to impose was in effect the imposition of an indirect tax, or of an obligation in the nature of a tax, upon the street railway, it follows that the denial of the right to impose that requirement is more consistent than would be upholding the requirement, with the rule that statutes delegating to municipal authorities and other inferior authorities the power of imposing taxation must be in clear, unambiguous terms, and are subject to the rule of strict construction.

Endlich (*ubi supra*).
Bennett v. *Birmingham*, 31 Pa. St. 15.
Frankfort Railway v. *Philadelphia*, 58 Pa. St. 119.

In the case of *Cambridge* v. *Railroad Commissioners*, 153 Mass. 161, where the legislature provided that a certain avenue might be laid out, and that said avenue "may cross at grade any railroad operated by steam," and that the Railroad Commissioners should prescribe the details of the crossing, the Court held, contrary to the claim of the Railroad Commissioners, that the latter could not require the crossing to be made by an overhead bridge, but confined the details to be fixed by the Commissioners to such as had not been fixed by the legislature itself.

If, as was held in the case of *Commonwealth* v. *Smith*, an act authorizing railroad companies to issue bonds in a certain way was in effect a prohibition upon the issue of bonds in any other way and cut down the previous existing common law

right to issue bonds in any and every way; and if, as in the case last cited, under an authorization to a city to lay out an avenue at grade over a railroad, the details of which crossing were to be determined by a public board under delegated authority from the legislature, that board could not require the avenue to be carried over the railroad, is it reasonable to maintain that in the present case, where the legislature has specifically provided that the street railway company shall *keep in repair the surface material* of a certain portion of the street, and that portion a smaller portion than the legislature had formerly prescribed, a board of aldermen is at liberty to extend and increase the legislative requirements to any extent it sees fit for the sole benefit of a particular municipality?

If such a power does reside in the board of aldermen, then, as the board represents not the City of Worcester, but the public generally, it must follow that a requirement in a grant of location for the pavement of a street, or the rendering of any other duty, for the benefit of any other municipality than the City of Worcester, would be equally binding, since as was said in the case of *Cambridge* v. *Cambridge Railroad Company*, 10 Allen, at p. 56:—

> "The City of Cambridge has no right or interest in the road or its management, other than or different from that which belongs to any other municipal corporation in the Commonwealth, except that which may exist or accrue by reason of the provisions contained in section 7 of the original charter of the corporation, Statutes 1853, chapter 383, by which the right is granted to the cities of Boston and Cambridge of purchasing the franchise and property of the corporation on certain prescribed terms," etc.

IV.

The requirement relative to paving and its maintenance, being in excess of the power of the aldermen, was simply void.

Even a contract made by a town in excess of its corporate powers is invalid.

> "That a contract made by a town or its agents in excess of its corporate powers is invalid is settled by many cases."
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> *Swift* v. *Falmouth*, 167 Mass. 115 at p. 121, citing
> *Stetson* v. *Kempton*, 13 Mass. 272.
> *Anthony* v. *Adams*, 1 Met. 284.
> *Minot* v. *West Roxbury*, 112 Mass. 1.
> *Greenough* v. *Wakefield*, 127 Mass. 275.
> *Mead* v. *Acton*, 139 Mass. 341 at p. 344.
> *Spaulding* v. *Peabody*, 153 Mass. 129.
>
> See also
>
> *Dill* v. *Wareham*, 7 Met. 438.

The Worcester Consolidated Street Railway Company, the defendant in error, is not estopped to set out any of the true facts of these cases, or any of the principles of law applicable thereto, because all the elements of an estoppel are lacking. The Street Railway Company cannot be shown ever to have done any act *in pais*, or to have made any representation which the City of Worcester has believed or acted on to its prejudice, in such wise as to preclude the Company to assert the real facts and the principles of law applicable thereto.

The same rule applies to restrictions or provisions imposed illegally or in excess of authority by boards acting in a public character in this Commonwealth.

> In *Parsons* v. *Northampton* the plaintiff sought to enjoin the payment by the defendant of any part of the expense of abolishing the South Street grade-crossing, and one of the grounds on which it was contended that the payment should not be allowed was "because public school property

has been taken by the proceedings" of the county commissioners. In the opinion, Mr. Justice Barker, referring to this ground, observed that "the taking of a portion of a school-house lot for one of the approaches, even if void for want of authority in the commissioners, would not make their whole decree illegal, or the expenditure of money for carrying their order into effect void, so far as it was authorized by law."

Parsons v. *Northampton*, 154 Mass. 410 at p. 413.

The principle stated in the last case cited, that a provision void for want of authority would not make the whole decree illegal, is particularly applicable to the situation of boards of aldermen and selectmen under sections 7 and 21 of chapter 113 of the Pnblic Statutes, and springs naturally and logically from the capacity in which they act, the nature of the principal question submitted to their determination, and the object that the legislature had in view in conferring the power to impose reasonable restrictions.

As has already been pointed out, the aldermen act for the whole public and in no sense for the city; and as appears from cases cited in an earlier part of this argument, and still more conclusively from those cited in the second part of the argument, the result of their action does not create a contract. No part of their order, therefore, constitutes a consideration.

The charter of a street railway company is not granted for the profit of the donees, but for the furtherance of a public benefit, the inducement moving the legislature being to secure for the public a more full and beneficial use of the highways.

Commonwealth v. *Temple*, 14 Gray, 69 at p. 76.

The only contractual element involved is an implied agreement that the donees shall not be deprived of an opportunity to receive a reasonable return upon the investment of their private capital to promote the public service desired.

Commonwealth v. *Temple*, ubi supra.

The legislature itself in granting the charter has determined primarily the fundamental question that a railway in the general location described in the charter will be for the public benefit. The subordinate determination of the exact location of the railway in particular streets and highways within the territorial limits of particular cities and towns has been delegated to boards of aldermen and selectmen, respectively. As regards these boards, the fundamental question for *their* determination is: Do public necessity and convenience require to any extent, and, if so, to what extent, the location of a railway in the streets designated in the petition? After determining this question, they are to determine further under what restrictions the privilege of performing the public service contemplated by the charter shall be exercised in such streets. These restrictions, so far as they are valid and lawful, are binding upon the company if the location is accepted and the railway built upon it; but they are binding not by reason of any contract, but because, and so far as, they are lawfully imposed under authority of the legislature. If an unlawful restriction is included among them, that restriction is of no effect, because, being unlawful, it is foreign to the purpose for which the company was chartered, and foreign to the objects to be accomplished by the construction and operation of the railway. This appears from the language of section 63 of chapter 113 of the Public Statutes, authorizing this Court "to compel the observance of all laws governing street railway companies, and of all orders, rules, and regulations *made in accordance with this chapter* by the board of aldermen of a city or the selectmen of a town, or the Board of Railroad Commissioners." An order, therefore, not in accordance with the chapter would not be enforceable.

The acceptance of the location required by the statute is not in the nature of an agreement to perform and observe the restrictions. No agreement is necessary from the subject to compel compliance with the laws of the sovereignty. Every

law lawfully passed is binding upon all persons embraced within its limits quite irrespective of whether they like it or not, and whether they agree to submit to its provisions or not: so of every restriction lawfully imposed by the board of aldermen upon a street railway company. The restrictions annexed to the grant of location stand no differently as regards their effect upon the street railway company than any other order or regulation of the board of aldermen made under authority of any of the other sections of chapter 113 of the Public Statutes. No acceptance of such orders or regulations is necessary, or could add anything, to their efficacy. The acceptance required by section 7 and by section 21 of the location is to furnish evidence of the physical location of the company's railway, as until the location has been accepted there is nothing on record to show that the company intends to build its railway, or where it intends to build it. The route fixed by the board of aldermen may not be satisfactory. If it is not, the legislature desires evidence of the fact, and this evidence is supplied by the acceptance, or failure to accept, by the company within the thirty days fixed by the statute. The language of the statute itself is significant of this intention: "The location thus granted shall be deemed and taken to be the *true location of the tracks of the railway* if acceptance is filed," etc.; that is, the statute itself makes the order and the acceptance together constitute merely a designation of the physical position of the tracks. The words "tracks" and "railway" both refer to a physical, tangible thing to be placed in the streets, and in no sense to an agreement or anything in the nature of an agreement. All that follows from the action of the aldermen and the acceptance of the directors is the fixing of the true location *of the tracks*, and not at all any legal conclusions such as follow the acceptance of a statute which contains a provision that it shall not be binding until accepted. In the latter cases certain provisions expressed in language are fixed by the acceptance.

Suppose that the Company, in its acceptance of the locations, had added a statement that it accepted the same "subject to all the restrictions and conditions thereto annexed, so far as the same were lawful, and so far as the mayor and alderman had authority to impose the same as obligations upon the Company." No one can doubt that the Company would have had a right to add this statement, or that, having added it, the acceptance would still be good and the Company entitled to use the location; nor would the mayor and aldermen have been thereby in any way prejudiced. Having made their determination that the grant of the location was required by public necessity and convenience, and having specified the restrictions which they deemed the public interests required, their jurisdiction was at an end. They could not have recalled their grant because of the modified form of acceptance. The acceptance of the location actually filed by the Street Railway Company in the case at bar has no other effect than it would have had with the addition of the statement suggested above.

THIRD.

Assuming that the Board of Alderman acted, in imposing the so-called conditions, as the representatives of the City of Worcester, and that they were authorized to impose the conditions in form and manner as they attempted to do, nevertheless they represented said city in its corporate capacity as a mere governmental agency, and not in its private corporate capacity, so that, if said city became the obligee in any contract to which the Street Railway Company was obligor, the rights of said city under said contract were held not as its private property, but in trust as a governmental agency for the public in general, and were, therefore, subject at all times to the control of the legislature.

Cities have almost no private property.

South Dakota v. *North Carolina*, 192 U. S. 286 at p. 318.

There is no kind of property more clearly stamped with a public trust, the control of which for any purpose is vested in municipalities or their officers, than the public highways, and all duties touching their control.

The legislature of the State represents the public at large, and has full and paramount authority over the public ways and public places. Such ways

"are for the *public* use, and the use is none the less for the *public at large*, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities."

Dillon on Municipal Corporations, 4th edition, sect. 656, vol. 2.

"Streets do not belong to the city or town within which they are situated, even although acquired by the exercise of the right of eminent domain and the damages paid out of the corporation treasury.

"The authority of municipalities over streets they derive, as they derive all their other powers, from the legislature, from charter or statute."

Dillon on Municipal Corporations, 4th edition, sect. 683, vol. 2.

Brimmer v. *Boston*, 102 Mass. 19.

"The counties, towns, and cities into which the Commonwealth is divided are strictly public corporations, established for the convenient administration of government. Their municipal powers and duties are not created and regulated by contract, express or implied, but by acts passed by the legislature from time to time, according to its judgment of what the interests of the public require; and they have not the same rights to judicial trial and determination, in regard to the obligations imposed upon them, as other corporations and individuals have."

Inhabitants of Agawam, et al. v. *County of Hampden*, 130 Mass. 528 at p. 530.

Citing *Freeland* v. *Hastings*, 10 Allen, 570, 579, 580.
Rawson v. *Spencer*, 113 Mass. 40, 45.
Stone v. *Charlestown*, 114 Mass. 214, 223, 224.
Coolidge v. *Brookline*, 114 Mass. 592, 596, 597.
Hill v. *Boston*, 122 Mass. 344, 349, 355–357.
Laramie v. *Albany*, 92 U. S. 307.
Tippecanoe Commissioners v. *Lucas*, 93 U. S. 108, 114.
New Orleans v. *Clark*, 95 U. S. 644, 654.

See further to this point,

Meriwether v. *Garrett*, 102 U. S. 472. (1880.)
Prince v. *Crocker*, 166 Mass. 347.
Browne v. *Turner*, 176 Mass. 9.

The burden of proof is strongly upon the party asserting such private ownership by a municipality.

Proprietors of Mt. Hope Cemetery v. *Boston*, 158 Mass. 509 (1893),

as cited and distinguished in

Browne v. *Turner*, 176 Mass. 9, at p. 13.

FOURTH.

Whatever may have been the state of the law at the time the extensions of location involved in these suits were granted, the legislature, by enacting chapter 578 of the Acts of 1898, relieved this defendant from obligation to keep in repair any part of the surface material of the streets included in any of said extended locations.

Although the defendant in error does not believe that it is open to the plaintiff in error in these proceedings before this Court to argue that the Supreme Judicial Court of Massachusetts erred in its interpretation of this Statute, as the plaintiff would by such argument argue itself out of court and leave the case without any Federal question upon which to establish the right of the plaintiff to appear before this Court,

nevertheless, as its interpretation has been assigned as one of the errors of the State Court, the defendant in error submits the following argument in confirmation of the judgment of said Supreme Court on this question : —

The petitions for mandamus and the two bills in equity refer to the same two locations, both of which were granted as extensions of locations under section 21 of chapter 113 of the Public Statutes.

See reservation of the Chief Justice of the mandamus cases for consideration of the full Court.

All the locations referred to in the plaintiff's declaration in the action at law brought to recover from the defendant money alleged to have been expended by the City of Worcester in doing work which, it is alleged, the defendant should have done, were granted, according to the allegations of the declaration itself, under section 21 of chapter 113 of the Public Statutes.

Legislative History of Chapter 578 of the Acts of 1898.

What the law was prior to the enactment of this statute has already been considered in another part of this brief. It is now proposed to examine the broad general principles upon which this statute was drawn, and then to examine in detail certain clauses and certain other principles of law by which the plaintiff in error may claim, and claimed in the court below, have rendered inoperative the general purpose which the framers of the statute had in mind. As in the course of the examination it will be necessary to make frequent references to legislative documents and proceedings, the attention of the Court is now called to the following decision sustaining the propriety of such references : —

" C. ALLEN, J. In construing an act of Congress, the title of the act, the objects to be accomplished, the other provisions found in connection with those under especial consideration, the provisions and arrangement of the statutes which were amended, *the mode in which the embarras-*

sing words were introduced, as shown by the journals and records, the history of the times, *and especially of prior legislation upon the same general subject,* may all be considered."

Simpson v. *Story,* 145 Mass. 497 at p. 498,

and the cases therein cited:—

See also *Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 464.
Binns v. *United States,* 194 U. S. 486, 495.

In his inaugural message of January 7, 1897, the late Governor Wolcott called the attention of the legislature to the subject of street railways and their relations to cities and towns in the following language:—

"The essential difference between street railway companies and railroad corporations lies in the fact that the former have the right to use, in common with other citizens, the public highways, whereas the latter have the exclusive use of their road-beds. In comtemplation of law this right to use the public way is granted such companies on the sole ground that it is for the 'interest of the public' that they be allowed so to do; this phrase recurring repeatedly in the statutes authorizing boards of aldermen in cities and the selectmen of towns to grant, refuse, extend, and revoke locations. In theory, therefore, the granting of a location is an accommodation to the public, and not a privilege or gift to the railway company; the franchise being granted solely for the convenience of all the citizens, as a method of affording cheap and convenient transportation over public ways. Upon this theory, if it is found that the right of thus using the streets is profitable beyond a moderate return upon the capital actually invested, it is just to require that the fares be reduced or the service improved. If this remedy were proved in practice to be easy of application, it would afford the best solution of this vexed problem; but this has not been found to be the case, and, in consequence, contrary to the theory of our existing law, these grants have often proved of great pecuniary

value to the companies receiving them. This has led to a general demand that a direct return shall be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets, or by a percentage of receipts or profits. This can be justified only upon a different theory; namely, that a valuable right is granted to the company, and therefore is taken away from the public. If such a direct return is exacted, it seems just, on the other hand, that the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility, or the lure of a higher bid from would-be competitors. It is possible that in some municipalities one of these conflicting theories might be more acceptable, whereas in others the public convenience might be better served by adoption of the other. Under existing legislation there is no authority to impose any tax whatever. I recommend that this authority be granted."

The legislature of that year passed an act entitled "An Act to provide for the appointment of a committee to investigate the subject of the relations between street railway and municipal corporations," the second and fourth sections of which set forth the duties of the proposed committee, as follows: —

"SECT. 2. The said committee shall forthwith proceed to investigate and consider the relations existing between cities and towns and street railway companies, the taxation of street railways and their franchises in this Commonwealth, and in other states and countries, and shall consider what legislation, if any, is needed to establish a more fixed tenure of franchises of street railways, and an *equitable* method of taxation thereof in this Commonwealth."

Acts of 1897, chap. 509.

The Governor appointed as members of this committee the Hon. Chas. Francis Adams, Hon. Wm. W. Crapo, and Hon. Elihu B. Hayes, all of whom duly qualified on July 20. This committee made a printed report to the legislature of

1898, and accompanied its report with drafts of two bills, only the first of which has any bearing upon the question now before the Court. This report with its accompanying bills may be found among the legislative documents of 1898, printed as House No. 475. This report was submitted to the legislature February 2, 1898, and referred to the Committee on Street Railways.

House Journal, p. 163.

The title of the bill annexed to the Governor's committee's report was "*An Act relative to street railways.*" On May 20, 1898, the committee on street railways reported a bill, printed as House No. 1352, based upon the Governor's committee's report, and entitled "*An Act relative to street railways.*"

House Journal, p. 1024.

The latter bill after due consideration by both branches of the legislature and with various amendments was finally enacted as chapter 578 of the Acts of the year 1898 under the same title, viz.: "*An Act relative to street railways.*"

The bill of the Governor's committee and the enacted statute will be found upon comparison to correspond so closely as to leave no reasonable doubt that the statute was based upon the bill, and that the statute adopted substantially all the provisions contained in the bill, although the 23 sections of the bill will be found expanded into 28 sections in the statute, the new matter in the statute being indicated in the following synopsis of the relation of the sections of the bill and statute: —

Sections numbered one to seven in both the bill and the statute refer to the same subject-matter.

Section eight of the statute is not found in the Governor's committee's bill, and will be considered in connection with the subject of the excise tax.

Sections nine to thirteen of the statute correspond with sections eight to twelve of the bill.

Section fourteen of the statute introduces a subject not touched upon in the bill; to wit, the authorization to the Railroad Commissioners to grant locations in certain cases where such grants have been refused by the local authorities.

Sections fifteen to twenty-three of the statute correspond in their respective subject-matter to sections thirteen to twenty-one of the Governor's committee's bill.

Section twenty-four of the statute relates to locations in State highways, which was not considered in the Governor's committee's bill.

Section twenty-five of the statute confers jurisdiction upon the Supreme Judical and Superior Courts to enforce the provisions of the statute, and to review the proceedings of State Boards in matters affecting street railways.

Section twenty-six of the statute corresponds to section twenty-two of the bill.

Section twenty-seven of the statute makes certain verbal amendments in section 8 of chapter 113 of Public Statutes.

Section twenty-eight of the statute, corresponding to section twenty-three of the bill, as to the date when the act shall take effect, also embodies considerable new matter relative to the Boston Elevated Railway Company, made necessary by the legislature's omission of that company from the operation of the provisions of the statute during the period of twenty-five years from the date of that company's charter.

Subject-matter of the Governor's Committee's Bill.

Section 1 of the committee's bill contained merely definitions of various words and phrases used in the bill. The committee's bill in its other sections embodied the following principles: —

1. In sections 2, 4, and 5 of the bill, provision was made

for the distribution of the corporation or franchise tax paid by street railway companies, under chapter 13 of Public Statutes, among the cities and towns in which they respectively operated their railways instead of among the cities and towns in which their stockholders resided.

2. Section 3 imposed an additional tax upon street railway companies equal to the excess paid in dividends in certain cases over 8 per cent. In speaking of this tax, the committee said in its report (p. 38): —

> "Aside from the matter of distribution, there seems to the committee no sufficient reason to suggest any *additional* taxation of street railways except in the following particular:"

and then follows in the report an explanation of the tax which has just been mentioned in this brief.

3. "Sections 6 to 11, inclusive," as explained in the committee's own language in a note to these sections,

> "relate to the same subject. The considerations on which they are based are discussed in the report, pages 26–28. Certain burdens in the way of street paving, clearing of ice and snow, etc., now imposed on the street railway companies in labor, etc., are commuted into their fair equivalent in money payments. The sections are designed to restore to the cities and towns complete control of their streets and responsibility for their condition, while providing for money payments from the companies equal to the cost of the work in connection with streets done by them under all provisions of law now in force."

4. Sections 12, 13, 14, and 15 relate respectively to the granting, extending, altering, and revoking of locations.

5. Section 16 relates to limiting the use of free transportation and of free passes, and imposes an ingenious penalty for its violation.

6. Sections 17, 18, 19, and 20 provided for assessing street railway companies in certain instances for a part of the expense of widening streets.

7. Section 21 related to the regulation of fares by the Railroad Commissioners, materially changing the provision then existing in section 44, chapter 113 of the Public Statutes.

8. Sections 22 and 23 covered the repeal of certain statutes and sections of the Public Statutes which the enactment of the bill would render unnecessary or inconsistent with its provisions, and fixed the date when the bill should take effect if enacted.

The Commutation Tax Scheme of the Governor's Committee.

The Governor's committee in its report discussed, criticised, and condemned the divided control of, and responsibility for, the streets resulting from the provision of law contained in section 32 of chapter 113 of the Public Statutes. The committee laid down in its report and embodied in its proposed legislation two propositions, viz.: "First, that it is the business of the city or town to keep its streets properly clear of obstructions; and, secondly, that under the circumstances the street railway companies should in this specific instance compensate them for so doing." The bill accordingly provided for the assessment of a new tax upon street railway companies graduated in proportion to their gross earnings per mile of track operated; for the distribution of this tax, as well as of the franchise tax, among the municipalities in which the railway was situated in proportion to the miles of railway in each municipality; for the application by cities and towns of all amounts received from their tax to the construction, repair, and maintenance of public ways within their respective limits; and for the relief of the street railway companies from any further liability for the maintenance and repair of the highways.

The committee thus summarized these provisions in its report: —

> "They establish the legal obligations of the parties, restoring to the municipalities, in so far as may be, the full

control of their public ways, and making them solely responsible for the condition of those ways, both as respects pavement and freedom from obstruction; and, on the other hand, so far as the street railway companies are concerned, the present obligations for labor or pavement work are commuted into fixed money payments, in the nature of a tax."

See report, House No. 475, pp. 26–28.

See note of the committee appended to section 6 of the committee's proposed bill.

See also appendix "H" at page 275 of said report, House No. 475, showing how the proposed commutation tax would fall upon the different street railway companies, and also how the tax would be distributed among the various cities and towns, and especially see the following statement in the introductory note to said appendix "H":—

"These figures may be and probably are rather in excess of the actual charges of this nature; but they were taken in order to compensate liberally the cities and towns for any exceptional expenses either in the nature of pavements or removal of snow, as these items, especially the latter, cannot be definitely fixed for any particular year."

Legislative Documents 1898, House No. 475, p. 275.

Did the legislature in its enactment of chapter 578 of the Acts of 1898 adopt the plan contained in the bill submitted by the Governor's committee as explained in the committee's report?

It is the defendant's contention that this question must be answered in the affirmative, and that the plaintiff's claim against the defendant cannot be maintained in any of the forms in which it has been made the basis for legal proceedings in the various cases at bar, unless the language of the statute is so different from that of the committee's bill as to lead the Court to answer in the negative the question just stated.

I.

There is a substantial correspondence between the language of the statute and that of the committee's suggested bill.

Consideration of this proposition, that the language of the statute indicates the approval and adoption by the legislature of the plan and purpose laid down by the Governor's committee, may be facilitated by a comparison of the corresponding sections in the bill and in the act relating to the subject of the commutation tax, and to the correlative subject of the non-liability of street railway companies for the further care of any portion of the highways. There therefore here follows a copy of sections 6, 7, 9, 10, 11, and 12 of the statute. So much of the language of each section as is taken from the corresponding sections of the committee's bill is printed in ordinary Roman type. So much of the language of the statute as is not contained in the bill is printed in italics; and such portions of the bill as are not included in the statute are printed in heavy type. Finally, such words and clauses of the statute as were adopted by way of amendments in the passage of the bill through the legislature after the same had been reported to the legislature by the legislative committee on street railways are, where such amendments seemed of material importance, indicated by heavy-faced italics if the amendment was by way of an addition to the reported bill.

"SECT. 6. Every street railway company shall on or before the fifteenth day of October in each year make and file in the office of the board of assessors of every city and town in which any portion of the railway operated by it is situated a return signed and sworn to by its president and treasurer, stating the length of track operated by it *in public ways* in such city or town, and also the total length of tracks operated by it *in public ways*, determined as provided in section 2 of this Act, and also the amount of its gross receipts during the year ending *on* the thirtieth day

of September next preceding, which gross receipts shall include all amounts received by it from the operation of its railway, but shall not include income derived from *sale of power, rental of tracks or* other sources.

"SECT. 7. On or before the first day of November in each year the assessors of every city and town in which any street railways are operated shall assess on each company operating such railways therein *an excise* tax of an amount equal to such proportion of the following percentages of the gross receipts of such company as the length of tracks operated by it in *public ways of* such city or town bears to the total length of tracks operated by it *in public ways*, to wit: —

"In case of companies whose annual gross receipts per mile of track operated *are four thousand dollars or less one per cent. of the total annual gross receipts;* in case of companies whose annual gross receipts per mile of track operated are *more than four thousand dollars and less than* seven thousand dollars **or less** two per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than seven thousand dollars and less than fourteen thousand dollars, two and one-quarter per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than fourteen thousand dollars and less than twenty-one thousand dollars, two and one-half per cent of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than twenty-one thousand dollars and less than twenty-eight thousand dollars, two and three-quarters per cent. of the total annual gross receipts; and in case of companies whose annual gross receipts per mile of track operated are twenty-eight thousand dollars or more, three per cent. of the total annual gross receipts. The *excise* tax provided by this section shall be in addition to the taxes now provided by law.

"SECT. 9. 8. Prior to the fifteenth day of November in each year the assessors of every city and town shall notify the collector of taxes in such city or town of the amount of **the** *excise* tax assessed therein on every street railway company under the provisions of section seven of this act,

and the collector shall forthwith notify the treasurer of every such street railway of the amount of the *excise* tax so assessed on it. Said *excise* tax shall become due and payable to such city or town within thirty days from the receipt by such company of *the* notice of the amount of said *excise* tax.

"All the provisions of law relating to the collection of taxes on property taxed locally, so far as the same are applicable, shall apply to the *excise* tax assessed under said section seven.

"SECT. *10.* 9. All amounts paid to cities and towns under the provisions of sections five and eight *nine and twenty-eight* of this act shall be treated by such cities and towns as a separate fund and shall be applied *towards* the construction, repair, and maintenance of the public ways, *and removal of snow therefrom*, within such cities and towns.

"SECT. *11.* 10. Street railway companies shall not be required to keep any portion of the surface material of streets, roads, and bridges in repair, but ***they shall remain subject to all legal obligations imposed in original grants of locations, and may, as an incident to their corporate franchise, and without being subject to the payment of any fee or other condition precedent, open any street, road, or bridge in which any part of their railway is located, for the purpose of making repairs or renewals of the railway, or any part thereof, the superintendent of streets or other officer exercising like authority, or the board of aldermen, or selectmen, in any city or town where such are required, issuing the necessary permits therefor.*** Whenever, *during* the same is disturbed by reason of the original construction or subsequent alteration or extension, *or the making of any such repairs or renewals*, of any railway or by reason of any repairs or renewals of any railway or any part thereof, *said surface material is disturbed*, the company owning or operating such railway shall, at its own cost, *except as otherwise provided in this act*, renew and replace *to the reasonable satisfaction of the superintendent of streets, or other officer exercising like authority*, said surface material with the same form of construction or with such other form as the superintendent of streets, or other officer exercising

like power shall approve *as that disturbed, or, by first obtaining the approval thereof by such officer, with a different material and form of construction,* and shall restore the same *said street, road, or bridge* to as good condition as the same was *existed* at the time of such disturbance. Every street railway company shall be liable for any loss or injury that *suffered by* any person may sustain by reason of the carelessness, neglect, or misconduct of its agents or servants in ***the management and use of its tracks and,*** *during* the construction, alteration, extension, repair, or renewal of its railway, or in the renewal or *while* replacing of the surface of the *any* streets disturbed as aforesaid, *and resulting from the carelessness, neglect, or misconduct of its agents or servants engaged in the prosecution of such work, provided that notice of such loss or injury is given to the company and an action therefor commenced in the manner provided by section nineteen of chapter fifty-two of the Public Statutes and acts in amendment thereof.* ***Nothing in this section shall be construed to affect, enlarge, or diminish the rights, duties, or liabilities of any street railway corporation for or concerning the construction or maintenance of any bridge or bridges, or parts thereof, which any private person or corporation is now bound or legally liable, or may hereafter become bound or legally liable, in whole or in part, to construct or maintain.***

"SECT. *12.* 11. Street railway companies *shall* may clear snow from their tracks in such a manner as may be approved by the superintendent of streets, or by any other officer exercising like powers and shall, under the direction of such superintendent or officer, level the snow thrown upon the streets by them so as to make the highways safe for public travel; but they shall not be required to remove from the streets snow displaced in clearing their tracks as aforesaid *in the city or town in which such tracks are situated.*"

From the foregoing comparative view of the bill and the statute it is very evident that the committee's draft was adopted substantially without amendments in sections 6, 7, 9, and 10

of the statute. Amendments which were not merely verbal in these sections were two in number, namely:—

(*a*) In section 7, to the five classes of companies, graduated according to their gross receipts per mile of track operated, provided for by the Governor's committee, the legislature added a sixth class by dividing the committee's first class of companies receiving less than $7,000 per mile into two classes; namely, those earning less than $4,000 and those earning between $4,000 and $7,000.

(*b*) In section 10 was added a provision that the amounts paid to cities and towns under the provisions of the statute shall be applied towards *the removal of snow from the public ways*, as well as towards the construction and maintenance of such ways.

In section 11 numerous changes are apparent, which may be indicated as follows:—

(*a*) The clause, "They shall remain subject to all legal obligations imposed in original grants of locations," inserted. This clause, as indicated by the heavy italics, was added as an amendment while the bill was upon its passage through the legislature.

(*b*) The remainder of the first sentence of the section conferred upon the companies the right to make repairs without being subject to payment of fees or other conditions precedent.

(*c*) Verbal changes in the second sentence; and also

The insertion of the words after the requirement to replace surface material at its own cost "except as otherwise provided in this act," evidently referring to section 16, where in case of alteration the expense is to "be borne by such party or parties, and in such proportions, as the board of aldermen or selectmen may determine," and also to section 20, which provides that in case of alteration or change in grade of a highway under the provisions of chapter 51 of the Public Statutes there shall be included, as a part of the expense, "the necessary cost of changing its railway to conform to such alteration or change of grade."

The omission of the words "renew and" before the word "replace," making it very clear by implication that no renewal of the surface material is to be required of the street railway company.

The insertion of the clause in connection with the replacing of the surface material "to the reasonable satisfaction of the superintendent of streets or other officer exercising like authority"; and by

The substitution of the clause in reference to restoring the surface of the street to its former condition, "by first obtaining the approval thereof by such officer, with a different material and form of construction," for the clause in the committee's bill "with such other form as the superintendent of streets or other officer exercising like powers shall approve," merely making the provision more clear that the choice as to restoring the original form of construction was in every case with the company and negative any inference which might have been drawn from the language of the bill that the superintendent of streets could require the company to replace the disturbed surface with a different form of construction from that there at the time of the disturbance.

(*d*) The addition of a provision making a company liable for injury occasioned in the management and use of its tracks. This clause, as indicated by the heavy italics, was added to the bill in its passage through the legislature.

(*e*) Verbal changes more clearly limiting the company's liability in connection with construction, etc., of its railway to injuries suffered during the time that the work was actually being performed and negativing any inference of such liability for an accident resulting after the completion of the work and alleged to be due to the manner in which the work may have been performed.

(*f*) The insertion of a provision making the provisions of section 19 of chapter 52 of the Public Statutes applicable to actions to enforce such liability.

(*g*) The insertion of the last clause of the section evidently intended to preserve all contract rights of private individuals and corporations. This provision, as indicated by the italics, was added in the passage of the bill through the legislature.

It not being possible to conveniently indicate portions of the bill reported by the legislative committee on street railways which were omitted or struck out in the legislature, attention is now called to the following instances of that kind where the same were not merely verbal:—

(*a*) In section 7 the rate of percentage of commutation tax reported by the legislative committee for companies earning $4,000 or less per mile was one-half of 1 per cent.; of those earning between $4,000 and $7,000, 1½ per cent.; and in the case of each subsequent class one-half of 1 per cent. *less* than that now appearing in the statute; that is, the legislative committee ***reduced*** the tax rate one-half of 1 per cent. in each case below that fixed by the Governor's committee, and the House by amendment ***restored*** the rates to those fixed by the Governor's committee.

House Journal, June 2, 1898, pp. 1106, 1109.

(*b*) In section 12 the word "shall" in the first line was substituted for the word "may," and the following words reported by the legislative committee as the latter part of said section 12 in place of the words recommended by the Governor's committee, which are printed in heavy type in the foregoing comparison, were stricken out, namely:—

> "And shall, in a reasonable manner, level the snow thus thrown upon the streets so as to make the highways as safe and convenient for travel as conditions will permit, and the city or town shall, when public safety and convenience require, remove such snow from the highways."

See section 12 of House No. 1352.
House Journal, May 26, 1898, p. 1080.
House Journal, May 27, 1898, p. 1087.

A very important change made by the legislative committee in the draft of the bill proposed by the Governor's committee was by the insertion of an entirely new section printed as section 8 in the statute, and which was adopted substantially without change by the legislature.

From the foregoing analysis of the amendments made either by the legislative committee or the legislature itself to the bill submitted by the Governor's committee it may be confidently asserted that no intention appears to reject the plan of commuting by a money payment the street burdens formerly imposed upon street railway companies, unless such intention can be predicated upon the insertion of the clause in section 11, that "they shall remain subject to all legal obligations imposed in original grants of locations," or possibly upon the omission of the latter part of section 12 relative to the removal of snow and ice.

Section relative to Snow and Ice.

As regards the latter amendment, and in fact the whole subject of removal of snow and ice, the question is not fairly raised in the present cases. It is not the defendant's intention, therefore, to discuss this section of the statute beyond calling to the Court's consideration the fact that the removal of snow from the tracks, particularly of an electric street railway, is very much more closely related to the operation of the railway and to the convenience and benefit of the company itself than is the other matter of keeping the ordinary surface of the highway in repair. As regards snow and ice, it is a physical impossibility to operate a railway without their removal as speedily as possible, while, as regards the maintenance of the surface of the streets in repair, the company derives no benefit therefrom, nor does it by the operation of its cars, since the use of horses was discontinued, impose any special burden upon the surface of the streets.

The electric car of to-day can be, and in many cases is, operated over a railway constructed for all practical purposes in the same way as that of a steam railroad corporation.

While for these reasons the legislature might, had it seen fit,

retain to a certain extent the statutory obligation relative to removing snow from the tracks without retaining the obligation relative to the maintenance of the streets themselves in repair, it is at best doubtful if the amendment under consideration was intended to have this effect; for no change was made in section 10 of the statute providing that the money received from commutation tax should, among other uses, *be applied to the expense of the removal of snow*, and so much of the old law, section 27, Public Statutes, chap. 113, as related to the removal of snow and ice was repealed, and the penalty imposed by section 28 to enforce compliance with municipal orders relative to the removal of snow was thereby rendered inoperative and inapplicable to section 12 of chapter 578, and finally in the exception of the Boston Elevated Railway Company in section 28 of the statute from the application of the statute during the period of twenty-five years is a specific provision that it shall not apply to snow in any street or highway in which the Elevated Railway operates any railway.

History of the Clause "They shall remain Subject to all Legal Obligations imposed in Original Grants of Locations."

Coming now to the amendment in section 11, the history of its introduction into the act seems to be as follows:—

A motion was made in the House when the question was pending on ordering the bill to a third reading, May 27, 1898, to amend by inserting after the word "repair" in line 3 of section 11 the words "except as otherwise provided in the original grant of location."

House Journal, 1898, p. 1086.

This amendment was adopted.

House Journal, 1898, p. 1087.

On June 2, when the bill was pending on the question of passing it to be engrossed, a motion was made to strike out from the amendment previously adopted the word "original."

House Journal, 1898, p. 1107.

This amendment was rejected.

House Journal, 1898, p. 1109.

When the bill reached the Senate, the amendment in question was, on June 16, 1898, further amended by inserting after the word "otherwise" the word "hereafter."

Senate, Journal, 1898, p. 971.

In the adoption of this amendment the House non-concurred.

Senate Journal, 1898, p. 1003.
House Journal, 1898, p. 1203.

A committee of conference was appointed.

House Journal, 1898, p. 1203.
Senate Journal, 1898, p. 1003.

This committee reported, recommending that the original amendment as amended in the Senate, to wit, "except as otherwise hereafter provided in the original grant of location," be stricken out, and that there be inserted in place thereof the words "but they shall remain subject to all legal obligations imposed in original grants of locations." At the same time the amendment which now appears as the last sentence of section 11 in the statute, and which had been added in the House and non-concurred in in the Senate, was recommended for adoption by the committee on conference, and both recommendations were adopted.

House Journal, 1898, p. 1207.
Senate Journal, 1898, p. 1004.

Amendments proposed to eliminate the Commutation Tax Scheme from the Legislation.

It is a significant fact that no amendment was offered in the House either to the bill reported by the legislative committee

or to the bill of the Governor's committee, House No. 475, which was at one stage moved as a substitute for the legislative committee's bill, to strike out those sections of either bill which embodied the principle of the commutation tax and the municipal responsibility for the maintenance of streets. It is yet more significant that in the Senate such an amendment was moved and rejected.

Senate Journal, June 15, 1898, p. 957.
Senate Document No. 302.
Senate Journal, June 16, 1898, p. 969.

> "The pending amendments moved by Mr. Chamberlain striking out sections 7, 8, 11, and 12, and in section 10 striking out the words 'and nine' in lines 2 and 3, and striking out all after the word 'ways' in line 5, were severally rejected."

These amendments, had they been adopted, would have excluded from the statute *the commutation tax and the provision making municipalities responsible for the condition of the streets.* They would have also removed the provision that the money received from the new method of distribution of the franchise tax should be devoted not only to highway purposes generally, but also to the "removal of snow therefrom."

Section 8 of Chapter 578 of the Acts of 1898 is practically Conclusive Evidence of the Legislative Intent.

Section 8 of the statute originated with the legislative committee on street railways, and will be found in House Document No. 1352, the bill which that committee reported to the legislature; and now appears in the Revised Laws, chapter 14, section 45 (said Revised Laws being a legislative codification made in 1902 of the existing General Statutes of the Commonwealth).

This section was not contained in the suggested bill of the

Governor's committee, as printed in House No. 475. It contains most important provisions, and amounts in itself almost to a legislative statement of the design of the statute. Briefly, it provides for a triennial determination by the Board of Railroad Commissioners upon the petition either of a city or town or of a street railway company of

> "the average annual cost to said town or city of the work done by it during the preceding three years under the provisions of this act which by law it was not previously required to do, also the average annual payments made by said company to said town or city under and pursuant to said section during said three years,"

and, further, that, after such determination, the Board of Railroad Commissioners should revise and fix the excise

> "at such a rate as will be necessary to yield to said town or city annually thereafter an amount equal to the average annual cost to said town or city *of the work done by it during the preceding three years under the provisions of this act*, and *which it was not by law previously required to do*, as determined as aforesaid."

If the Legislature by the amendment in section 11 intended, as must be the case if the present suits of the City of Worcester are maintainable, that no change was to be effected in the previously existing relations between municipalities and street railway companies, one is forced to the conclusion that the legislature itself, and through the Governor's committee, devoted over a year of time and much expense to the consideration and enactment of a statute which should, by the operation of its own provisions, so far as its most important principles, those of the commutation tax and the responsibility for the maintenance of highways are concerned, become void and of no effect at the end of three years from the date when it became a law.

This clearly must be true if the contention of the plaintiff

is correct, and those actions are sustained, since upon the petition of the street railway company the Board of Railroad Commissioners would be forced to find that the City of Worcester had incurred no cost under the provisions of the act for work which it was not previously required to do, and that therefore the company need no longer mal e any annual payments by virtue of the commutation excise tax.

While from the language of section 8, as it appears in chapter 578 of the Acts of 1898, it may not be perfectly clear that the rate of tax is to be increased or diminished in accordance with the cost of the work done by the city as ascertained by the board of railroad commissioners, this doubt has been removed in the revised laws recently enacted at the special session of the legislature.

See Revised Laws, chap. 14, sect. 45.

See also note of the Report of the Commissioners for consolidating the Public Statutes to section 46 of chapter 14 of their Report, said note being printed at page 224 of said Report.

While it is therefore reasonably evident that the legislature adopted in its entirety the commutation tax principle, and the principle that the municipalities should be solely responsible for the condition of highways within their respective limits, it is necessary that the meaning and effect of the clause injected into section 11 should, if possible, be interpreted, since no part of the statute is to be rejected as surplusage, if it can be reconciled with the remainder of the act. It would be idle to assert that the clause is one capable of a fully satisfactory, and certainly it is not capable of an easy, explanation, but it seems safe to lay down certain propositions regarding it.

1. The word "original" was evidently used advisedly, as a motion to strike it out from the amendment in its earlier form was rejected in the House, as already pointed out.

2. The retention of the word "original" shows that the clause did not apply to extensions of locations. The distinc-

tion between original locations and extensions of locations is clearly made in section 15 of the statute, where provision is made for granting "a location for the extension of the tracks," with a limitation that no conditions shall be thereto attached other than or in addition to "such as may have been imposed in *the original grant of location*." This phrase, "original grant of location," in section 15, is precisely the same, except that it is singular intead of plural, as that in section 11; namely, "original grants of locations." In both sections the phrase cannot reasonably be construed to mean anything different from "original location," as defined in section 1 of the Act. The same distinction will be found in the note of the Governor's committee, House No. 475, to section 13 of that committee's draft of the bill, said section 13 corresponding to section 15 of the statute.

3. The clause is not meant to apply only to the future, since the word "hereafter," introduced by the Senate into the first form of the amendment, making it read "except as otherwise hereafter provided in the original grant of location," was omitted by the conference committee from the clause in its present shape.

4. The word "legal" qualifying the word "obligations" must be given much weight, as this word was introduced into the clause in its present form by the conference committee. In the former clause adopted by the House there was no reference to legality other than as it might be read into the clause, the express language being simply "except as otherwise provided," etc.; and there is certainly a distinction between legislative recognition of legal obligations and such a recognition of all provisions unlimited and unrestricted by the qualification of legality, the distinction being that provisions illegal, so far as the power to impose then existed, might be validated through such recognition, while the use of the qualification would leave the provisions just where they stood before, of no effect unless legal, and of full effect if legal.

5. Had the legislature seen fit in this clause to add the word "other," its meaning would at once have become simple and in entire harmony with the rest of the statute, as there are many legal obligations properly imposed in grants of location which are not really incident to keeping in repair the surface material of streets, and yet which the legislature might, from an abundance of caution, and to avoid the possibility of litigation, wish

to indicate as being unaffected by this statute. The best example of such a restriction is perhaps that considered by the Court in *Newcomb* v. *Norfolk Western Street Railway Company*, 179 Mass. 449. Apparently and superficially, this restriction might have been claimed to be in effect, that the company should keep the surface of the street in repair by watering, but upon examination it becomes apparent that the requirement relates really to the operation of the railway, and in the words of the Court, "although affirmative in form, in substance restricts the defendant to running cars in such a way as not to raise a dust." Other examples of such restrictions might perhaps be the following:—

Maintenance of guard-rails on bridges and at curves.

Maintenance of guard-fences where a railway runs at the side of the street on or near the edge of an embankment.

Requirements to oil rails at curves and turnouts.

Restrictions as to use of sand and salt in winter.

And it may well be that the most reasonable meaning to be given to the clause is, as many persons believe, to preserve the effect of "other legal obligations" imposed in grants of original locations.

Under any interpretation of chapter 578 of the Acts of 1898 the defendant is relieved from compliance with the requirements upon which these actions are based.

Even if the requirements which the aldermen of Worcester sought to impose in the various orders set out and referred to in the petitions for mandamus, the bills in equity, and the action of contract constituted, contrary to the contention of the defendant, legal obligations within the meaning of that term as used in section 11 of chapter 578, Acts 1898, they are not kept in force by the clause in the first sentence of that section, "but they shall remain subject to all legal obligations imposed in original grants of locations"; for in every instance the order of location set out in the various cases was an order for *an extension of location* granted under section 21 of chapter 113 of the Public Statutes.

Unless, therefore, the orders of location constitute contracts

which as against the City of Worcester the legislature was powerless to impair (a proposition elsewhere discussed), there is nothing in the Act of 1898 to keep the requirement in force. The only legal obligations preserved by that statute, if any, are those imposed in "original grants of locations." This phrase, "original grants of locations," is substantially defined in section 1 of the statute, as follows:—

> "In the construction of this act, unless such meaning would be repugnant to the context, . . . 'Location' shall mean the grant to a street railway company by vote or order of a board of aldermen of a city or selectmen of a town, when duly accepted by such company, of the right to construct, maintain, and operate a street railway in a public highway or street in such city or town. An 'original location' of a company in any city or town shall mean the first location granted to it in such city or town."

The exact term there defined is "original location," but the word "location" itself is also therein defined; while in section 15 the distinction is clearly drawn by the legislature between a location for an extension and an "original grant of location," and, as has already been pointed out, this is exactly the same phrase as that used in section 11. That the word "original" is of significance in section 11 is shown by the fact already pointed out that a motion was made to strike out the word "original," and was defeated.

The statute clearly recognizes such a difference as regards the future, and specifically prohibits in section 15 the imposition of "any obligations other than or in addition to those applying to all street railways under the general law in force at the date of the passage" of the statute, "or such as may have been imposed in the original grant of location to such company in such city or town subsequent to the passage" of the statute. Under the provisions of this section no company at any time receiving an extension of location in any city or town in which its original location had been granted under the provisions of the statute

could have any additional burden imposed which had not in fact been imposed in such original location, and no company receiving an extension of location in any city or town in which any of its railway had been located prior to the passage of the statute could have imposed upon it any requirement except such as the general statutes themselves imposed upon all street railways at the date of the passage of the act.

The Supreme Court of Massachusetts has recognized the difference between extensions of locations and the original locations of street railways.

So. Bost. R.R. v. *Middlesex R.R.*, 121 Mass. 485.
Daniels v. *Commonwealth, etc., Co.*, 175 Mass. 518.
Springfield v. *Springfield, etc., Co.*, 182 Mass. 41.
Worcester v. *Worcester, etc., Co.*, 182 Mass. 49.

As "original grants of location" do not include *extensions of locations*, and as all the grants in the cases before the Court are grants of extensions of location, the defendant respectfully submits that the Supreme Court of Massachusetts was not in error in its interpretation of the purpose and effect of the statute of 1898, chapter 578.

The following table shows the distribution and location of the various provisions of the Statute of 1898, chapter 578, in the Revised Laws of Massachusetts, the latest re-enactment of the general laws in the Commonwealth of Massachusetts: —

Statutes, 1898.	*Revised Laws.*
chap. 578, sect. 1	chap. 111, sect. 1; 112, sect. 1
" 578, " 2	" 14, " 37
" 578, " 3	" 14, " 41
" 578, " 4, 5	" 14, " 61, 62
" 578, " 6, 10	" 14, " 43–47
" 578, " 11	" 112, " 44
" 578, " 12	" 112, " 41
" 578, " 13	" 112, " 7

Statutes, 1898.	*Revised Laws.*
chap. 578, sect. 14	chap. 112, sect. 11
" 578, " 15–17	" 112, " 30–32
" 578, " 18	" 112, " 71
" 578, " 19–21	" 112, " 33–35
" 578, " 22	" 112, " 21
" 578, " 23	R. 1901, 180
" 578, " 24	R. L. 112, sect. 61
" 578, " 25	" " 112, " 98, 100
" 578, " 26	" " 14, " 61
" 578, " 27	" " 112, " 8
" 578, " 28	" " 112, " 1

FIFTH.

Assuming the purpose and effect of the statute, chapter 578 of the Acts of 1898, to have been to abrogate the obligations (if they were such) set out in the five cases before this court, it is clear that the legislature of Massachusetts did not, in so abrogating the obligations, violate any provisions of the Constitution of the United States.

The only principles of constitutional law which the plaintiff in error in the suits before this Court may, under the assignments of error, claim to be violated by the provisions of the statute are two:—

(*a*) Article I., section 10, of the Constitution of the United States, which forbids a State to pass any law impairing the obligations of contracts.

(*b*) Fourteenth Amendment of the Constitution of the United States, forbidding a State to deprive any person of his property without due process of law.

As has been shown above, the orders of location in suit never constituted contracts between the street railway company as obligor and the City of Worcester as obligee, because

the Board of Aldermen, in issuing the orders of location, did not and could not act for the City of Worcester in so doing, but acted as public officers, entirely independently of the City of Worcester. Even assuming, therefore, that the obligations in question were validly imposed (which the defendant in error denies), they did not and could not constitute contracts between the city and the Street Railway Company, nor did the Street Railway Company, by reason of such obligations, owe any duty, contractual or otherwise, to the City of Worcester. If, then, the so-called conditions were not contracts between the City of Worcester and the Street Railway Company, the Act of 1898, in abrogating them, constituted no violation of the obligation of any contract of which the City of Worcester can complain; and, if the condition resulted in no enforceable property right in the City of Worcester, their abrogation could not amount to depriving the city of its property without due process of law.

And, even assuming both that the obligations in question were validly imposed, and that they constituted contracts enforceable by the city against the Street Railway Company, the legislature, in abrogating them, was guilty of no violation of said provisions of the Constitution of the United States.

As has been shown above, these obligations, if property at all of the City of Worcester, were held by the city not as its private municipal property, but were held by it in its capacity as a mere governmental agency, and were, therefore, at all times subject to the control of the legislature. The following cases illustrate this right of State control:—

In a leading case this Court upheld as constitutional an act of a State legislature, ordering a town to discontinue a ferry, the right to keep which the legislature had previously granted to the town, the purpose of the revocation being to prevent the ferry from competing with a near-by toll bridge maintained by a private corporation.

East Hartford v. *The Hartford Bridge Co.*, 10 Howard, 511.

In another case the plaintiff, a county, had incurred a large debt, and had used the money for improving the whole county. An act of the legislature divided the county into three parts, and left all the debts theretofore contracted as a legal obligation against the plaintiff. This act of the legislature was upheld as constitutional by this Court, although the plaintiff corporation, which remained subject to all the debts, contained only one-third of the wealth and taxable property of the original county.

Laramie County v. *Albany County*, 92 U. S. 307.

In another case this Court upheld an act of the legislature annulling a town and resolving it back into the State.

Meriwether v. *Garratt*, 102 U. S. 472.

In a late Massachusetts case the Boston Transit Commission had executed a lease of a subway tunnel to the West End Street Railway Company, and by a later act of the legislature, in the absence of objection on the part of the West End Street Railway Company, authorized a lease of the tunnel to another street railway company, the Boston Elevated Street Railway Company. Certain inhabitants of the City of Boston brought a bill in equity, seeking various relief, on the ground that said later statute deprived the City of Boston of its property without compensation or due process of law, and impaired the obligation of a contract between the City of Boston and the West End Street Railway Company. In denying that said later act was unconstitutional on either of the grounds alleged, Chief Justice Holmes, speaking for the Court, said:—

"We prefer, however, to put our decision on more substantial grounds. The railroad company does not object to the changes, as was the case in *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1. The city has no greater interest in the lease than it has in the tunnel. Its interest in the lease is as much public property and as subject to legislative control as its interest in the tunnel. No part of the proceeds go to its private uses (St. 1894, chap. 548,

sect. 38; *Mahoney* v. *Boston*, 171 Mass. 427, 430): and, if any part did go to such uses, it is hard to see how, as against itself, the city, by making a contract to let public property held by it subject to the control of the legislature, could cut down this control. The control is not subject to the chance of the city's contracting, but the contract is subject to the power of the legislature over the subject-matter. *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334, 339, 340. *New Orleans* v. *New Orleans Water-works Company*, 142 U. S. 79, 91, 92. *Chicago, Burlington & Quincy Railroad* v. *Nebraska*, 170 U. S. 57, 72. *Railroad Company* v. *Ellerman*, 105 U. S. 166. See *Brighton* v. *Wilkinson*, 2 Allen, 27. *Brimmer* v. *Boston*, 102 Mass. 19. *Agawam* v. *Hampden*, 130 Mass. 528, 530, 531, *et seq.*"

Browne v. *Turner*, 176 Mass. 9 at p. 14.

See also

People v. *Kerr*, 27 N. Y. 188.
Clinton v. *Cedar Rapids, etc., R. Co.*, 24 Iowa, 455.

Even if any property rights accrued to the City of Worcester by virtue of the provisions of the grant of location, such rights are under the statute interfered with by the legislature itself in the exercise of its paramount authority over the highways, and full compensation by due process of law is provided in the statute itself.

Section 8 of the statute, as it now appears in Revised Laws, chap. 14, sect. 45, provides the method and the tribunal to ascertain the annual cost to the city of work done by it under the provisions of the statute which it was not previously required by law to do; that is, it provides for determining the *value* of the property right, if such a right existed, and for full compensation through the provision for readjusting the rate of the excise tax. Said section is as follows:

"SECTION 45. The aldermen of a city, the selectmen of a town or a street railway company operating in such

city or town may petition the board of railroad commissioners for a revision of the amount of the excise tax to be paid by a company under the provisions of the preceding section. Said board shall, under such petition, after public notice and a hearing at which said aldermen or selectmen and said company may submit evidence, determine the average annual cost to said city or town of the work done by it during the preceding three years under the provisions of chapter one hundred and twelve which it was not by law required to do prior to the first day of October in the year eighteen hundred and ninety-eight, and also the average annual payments made by said company to said city or town under and pursuant to the provisions of the preceding section during said three years; and having determined said average annual cost and average annual payments, said board shall fix and determine the proportion of a percentage of the gross receipts which shall be paid as an excise tax under the provisions of said section by the company to said city or town annually thereafter, said percentage to be fixed at such a rate as will be necessary to yield to said city or town annually thereafter an amount equal to the average annual cost to said city or town determined as aforesaid; and the percentage so fixed shall not be again changed for the period of three years and only in the manner herein provided. Said board may at any time upon petition therefor by a city or town entitled to a part of the excise tax paid by a street railway company, after such notice as the board may order to all other cities and towns entitled to share in the excise tax paid by said company, and after a hearing, determine as to the distribution thereof among the several cities and towns in which such company operated any part of its railway, and fix the proportions thereof to which they shall respectively be entitled, which shall thereafter be the proportions of said excise tax to be assessed upon said company, instead of the proportion based upon length of tracks as hereinbefore provided."

the Massachusetts Supreme

Section 25 of the statute vests both in ~~this~~ Court and in the Superior Court jurisdiction in equity to enforce the provisions of the statute, to review the rulings of law of any State board or commission relative to street railways, and

to annul, modify, and amend the same as law and justice may require. The act, therefore, contains ample provisions for securing to the city full compensation for any property or property rights to which it may be entitled.

Certain Cases Distinguished.

As the City of Worcester had no power to enter into contracts with the Street Railway Company respecting locations, unless such power can be shown to have been granted by the legislature or recognized by the decisions of the courts of the Commonwealth of Massachusetts, adjudications of the courts of other jurisdictions apparently holding that, under the circumstances of the cases there decided in which usually the street railway company was the moving party, there was a contract between a municipality and a street railway company, have little or no bearing on the question as to whether the obligations involved in these suits were contractual rights of the City of Worcester.

Many such cases, however, in other jurisdictions which may be cited as showing the existence of a contract without express legislative power to make the same, do not in fact so decide.

Cases of this sort may be divided into two classes : —

(1) Those cases where the municipality has been granted power by the legislature to enter into contracts with street railways respecting locations. Cases of this class are : —

N. Y. & N. H. Rd. v. *N. Y.*, 4 Blatchford, 193.
Indianola v. *Gulf, Western Texas & Pac. Ry.*, 56 Tex. 594.
City of Houston v. *Houston City St. Ry.*, 83 Tex. 548.

(2) Those cases where the street railway company is plaintiff insisting on some term in its grant of location, and prevails not because the location is a contract between the street railway company and the municipality, but because it

is at least an executed grant from the State to the street railway company. Cases of this class are: —

Des Moines City Ry. Co. v. *Des Moines*, 90 Iowa, 770.
Springfield Ry. Co. v. *Springfield*, 85 Mo. 674.
People v. *Obrien, Rec'r*, 111 N. Y. 1.
Wright v. *Milwaukee Electric Ry.*, 95 Wis. 29.
Arcata v. *Arcata & Mad River Ry.*, 92 Cal. 639.

Another class of cases may be cited by the plaintiff in error as upholding the right of municipalities in the jurisdictions where those cases were respectively decided to contract with a street railway company respecting locations without express power so to do, if the plaintiff in error can show that the municipalities in those cases did not, as a matter of fact, have such express power to contract, and that the locations were, as a fact, held in those cases to constitute contracts.

Cincinnati & Springfield Ry. v. *Carthage*, 36 Ohio, St. 631.
Pittsburgh & Birmingham Rd. v. *Birmingham*, 51 Pa. St. 41.
Detroit v. *Detroit Ry.*, 37 Mich. 558.
Hovelman v. *Kansas City Horse Ry.*, 79 Mo. 632.
Lansing v. *Lansing City Ry.*, 66 N. W. 949 (Mich.).
State v. *Corrigan Ry.*, 85 Mo. 263.
Kansas v. *Corrigan Ry.*, 86 Mo. 67.
Birmingham & Pratt Mines St. Ry. v. *Birmingham St. Ry. Co.*, 79 Ala. 465.
Belleville v. *Citizens' Horse Ry. Co.*, 152 Ill. 171.
Harvey v. *Aurora & Geneva Ry. Co.*, 186 Ill. 283.
Rutland Electric Light Co. v. *Marble City Electric Light Co.*, 65 Vt. 377.
Allegheny v. *Millville, Etna & Sharpsburg St. Ry.*, 159 Pa. St. 411.

That the mere fact that the language of an order of municipal authorities granting a location to a street railway company is apt to create a contract between the municipality and the street railway company does not result in such a contractual relation unless the municipality has power so to contract, is shown by two decisions of this Court. In *Georgia*

R.R. & Banking Co. v. *Smith*, 128 U.S. 174, this Court held that the provision in the charter of a railroad company that "the charge of transportation or conveyance shall not exceed five cents per mile for every passenger" did not constitute a contract with the railroad company that the rate of fares should never be reduced below five cents per mile. In *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U.S. 368, the question being on the words, in a grant of location to a street railway company, "the rate of fare for any distance shall not exceed five cents in any one car," this Court held that this language constituted a contract that the rates of fare should not be reduced below that amount, distinguishing at page 388 the case of *Georgia R.R. & Banking Co.* v. *Smith*, ubi supra, as follows: —

> "It may very well be that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract because the statute provided specially for that mode of determining them."

SIXTH.

It is submitted that the question whether the statute under consideration violates any provision of the Massachusetts constitution is not open in these cases before this Court.

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